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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES

Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 81) is reported in 107 F. Supp. 692. The opinion of the Court of Appeals (R. 96) is reported in 210 F. 2d 623.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1954. (R. 114.) The petition for certiorari was filed on April 26, 1954, and granted on June 7, 1954 (R. 115). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTE INVOLVED

Section 301 of the Taft-Hartley Act, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

> "Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of

the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ."

QUESTION PRESENTED

May a union, under Section 301 of the Taft-Hartley Act, sue in a federal district court for breach of that part of its collective bargaining contract with an employer which governs the payment of salaries to the employees?

STATEMENT

This is a suit by a union against an employer for breach of the collective bargaining contract between them. The union, petitioner here, is the Association of Westinghouse Salaried Employees. It represents, and has represented for more than 10 years, the more than 5,000 non-supervisory salaried employees of the company at its plants in East Pittsburgh and Homewood, Pennsylvania. (R. 2-3.) The company, respondent here, is the Westinghouse Electric Corporation. It is engaged in the manufacture and sale of electrical products in interstate commerce. (R. 2.)

The union is affiliated with the Federation of Westinghouse Independent Salaried Unions. (R. 2.) The Federation, in behalf of, and in conjunction with, its affiliates, has from time to time entered into national collective bargaining agreements with the company covering those bargaining units as to which the Federation or an affiliate has been certified by the National Labor Relations Board as the exclusive collective bargaining agent. (R. 8.)

The agreement sued upon here (R. 7-41) was entered into by the Federation and the company on November 1, 1950. This national agreement provides that the company will pay and "any employee will . . . receive" a salary in

accordance with a local schedule based upon the classification system in each separate bargaining unit. (R. 11.) Pursuant to this provision, a schedule of monthly salary rates for the various classifications in the units represented by the petitioner was executed on November 16, 1950 (R. 4, 42).

The national agreement also contains a no-strike clause (R. 32) and a grievance procedure (R. 32-35). The grievance procedure provides, among other things, that any dispute as to the interpretation, application or claimed violation of either the national agreement or any local supplement shall constitute a grievance. It further provides for a procedure for handling such disputes, beginning with negotiations, at three separate steps to be specified in local supplements, between the affiliate and the local management, and progressing to a national appeal level, at which representatives of the Federation and the company "meet in an effort to settle such grievances." (R. 34.)

The contract does not provide for final and binding arbitration of disputes which cannot be settled by negotiations at the national appeal level. It provides, instead, that "the parties may consider referring such matters to an impartial umpire or board by mutual agreement." (R. 35.) It also provides, as an exception to the general no-strike clause, that after the grievance procedure is exhausted without settlement, the Federation may authorize a strike over any dispute within the scope of the grievance procedure. (R. 32.)

On April 3, 1951, a number of the employees represented by the union were absent from work, and the company deducted a proportional amount from their monthly salaries because of that absence. The union, alleging that this action by the company constituted a violation of the collective bargaining agreement, as interpreted and heretofore applied, filed a grievance and exhausted the procedures established under the agreement for settlement by

negotiation (R. 6). Then it filed this suit against the company for breach of contract.

The complaint alleged substantially the facts set forth above. It prayed for (1) a judgment interpreting the agreement and declaring that the company's action was in violation thereof, (2) an order directing the company to make an accounting setting forth the individual names of those from whose salaries deductions had been made and the amounts of the deductions, and (3) a judgment in favor of the individual employees for the amounts of the unpaid salaries (R. 7). Jurisdiction was claimed solely under Section 301(a) of the Taft-Hartley Act, 29 U.S.C. 185(a), 61 Stat. 156.

The company filed a motion to dismiss. (R. 81.) The motion contained three grounds:

(1) The union was not the real party in interest and hence was not a proper party plaintiff;
(2) The Court lacked jurisdiction over the subject matter;
(3) The complaint failed to state a claim against the defendant upon which relief could be granted.

In support of the first two grounds, the company urged (R. 83) that the claim here arose only from the individual contracts of hire under the collective bargaining agreement and hence was not cognizable under Section 301(a). This argument was rejected by the District Court (R. 83-84), relying on *American Federation of Labor* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (6th Cir. 1950). The District Court then went on to examine the collective bargaining agreement and held, on the merits, that the agreement did not create any obligation to pay employees for absences other than those for causes specifically provided for. (R. 88.) Since the complaint did not specify the cause of the absences, the District Court held that no cause of action was stated and ordered the complaint dismissed. (R. 89).

The union appealed to the Court of Appeals. (R. 89.)

After argument had been heard, the case was set down for re-argument before the Court *en banc*. (R. 95.) On January 28, 1954, the Court, by a 4 to 3 vote, decided that the order of the District Court should be vacated and that the complaint should be dismissed for lack of federal jurisdiction. (R. 107.) The sole ground was that, "assuming that the plaintiff's construction of the collective contract is correct" (R. 101), the failure to pay to individual employees the wages specified in the collective contract did not constitute, in law, a violation of that contract within the meaning of Section 301(a). The majority did not reach the question of contract interpretation involved on the merits.

A petition for certiorari, raising only the issue decided by the majority in the Court of Appeals, was filed by the union on April 26, 1954. The writ was granted on June 7, 1954. (R. 115.)

SUMMARY OF ARGUMENT

The District Court clearly had jurisdiction over the complaint. It satisfactorily alleged the existence of a contract between an employer and a labor organization representing employees in an industry affecting commerce, and was brought for a claimed violation of that contract. The holding of the court of appeals that no federal jurisdiction existed because rights under the particular provision in the contract sued did not run to the labor organization is not a holding that the district court had no jurisdiction, but, rather, a holding as to the substantive rights of the parties under the collective bargaining agreement. The holding of the court of appeals that no federal jurisdiction existed was clearly in error.

This conclusion, however, only serves to lead to the resolution of the genuine problem presented by the decision of the court of appeals: the relative rights of the union, the employees and the employer which the courts will rec-

ognize as arising out of a collective bargaining agreement. Before arguing the proper resolution of this substantive problem it is necessary to decide whether that problem is to be resolved by reference to federal law or state law. While the legislative history of Section 301(a) is not crystal clear, it is plain that Congress did intend that collective bargaining contracts should be enforceable by both parties at law, and that the federal court should be open to resolve disputes as to the meaning of collective bargaining contracts as a method of avoiding strikes and industrial conflict.

This basic Congressional purpose can be effectuated only by holding that the substantive problem as to the distribution of rights under a collective bargaining contract must be settled in accordance with federal law, consonant with the other provisions of the National Labor Relations Act, as amended. Furthermore, interpretation of Section 301 as according a substantive right of action, rather than merely a forum in which to enforce state accorded rights, avoids a difficult question as to the constitutionality of Section 301 which would otherwise be presented.

Assuming that the allocation of the legally enforceable rights created under a collective bargaining agreement is to be determined as a matter of federal law, neither the existing theories summarized by the Court of Appeals nor the "eclectic" theory formulated by it is satisfactory. The older theories fail to account properly for the institution of collective bargaining as it has developed under the National Labor Relations Act and contain serious internal inconsistencies. The theory advanced by the court of appeals completely distorts the true nature of the collective bargaining relationship.

The theory formulated by the court of appeals is based, in the first instance, upon a separation of the collective agreement into two parts. According to the court, the employer promises the union to perform only those provi-

sions of the agreement containing benefits to the union as such. Its promise with respect to matters such as wages is only to include the negotiated provisions in the individual contracts of hire with the employees. It follows from this theory that the only suit which may properly be brought for breach of the collective agreement is a suit to obtain the benefits promised to the union; a failure to pay wages or other benefits to individuals can be remedied only by a suit on the individual contract of hire.

The separation made by the court of appeals is itself inconsistent with Section 301(a) because it finds the only enforceable contract with the union in provisions which are not essential to a collective bargaining agreement and which may not, in fact, exist in many such agreements. Disregarding this, however, and examining the "contract to make a contract" theory itself, we find that although the theory is logically consistent it completely misrepresents the nature of the rights and obligations inherent in the collective bargaining relationship.

Collective bargaining, as it has developed under the provisions of the National Labor Relations Act, includes more than negotiation by a union of the terms of a formal collective bargaining agreement. The process is a continuing one. The union is charged, under the Act, with the duty of negotiating with the employer not only concerning the agreement itself but also concerning the interpretation and application of that agreement. The union fulfills this continuing collective bargaining function by processing the grievances of individual employees who claim that the company has violated the collective bargaining agreement. In so doing it acts as the exclusive representative of all of the employees, as provided for in Section 9(a) of the Act. The only exception is that an individual employee does have a right to have his grievance adjusted without the intervention of his union, but this is subject to the union's right to be present at such an ad-

justment and to the requirement that the adjustment be consistent with the collective bargaining agreement.

The existence of this continuing relationship between the employer and the union is totally inconsistent with the theory that the only obligation contained in the collective agreement is to incorporate its term in the individual contracts of hire. This conclusion is underlined when the interrelationship between the grievance machinery and the lawsuit as a method of contract enforcement is examined. If it is held, as we believe it should be, that exhaustion of the grievance machinery is a necessary prerequisite to suit, this necessarily implies that the right to sue does not arise solely from the individual's contract of hire. Even if the right to sue is regarded as an alternate to the grievance procedure, a conclusion that the individual and only the individual can sue would provide a remedy inconsistent with the Congressional recognition of the union's interest in those cases which are handled through the grievance procedure and would in effect provide for individual rather than collective bargaining.

The collective group represented by the union has an interest in the enforcement of the terms of the collective agreement, even beyond the precedent-making effect of the settlement of individual complaints where the meaning of the agreement is in doubt. An important element in the consideration bargained for in the collective agreement is the establishment of a fixed rule of law with respect to the items set forth in it. A failure to accord to an individual employee a benefit specified in the agreement thus constitutes not only a deprivation of his rights but also an injury to the group as a whole. The union, in short, has bargained for a commitment to apply the rules uniformly and a failure to do so constitutes a breach of the employer's contract with it.

This would be sufficient, we believe, to compel a court to hold that the union should be given the right to sue here

even in the absence of a specific statutory mandate. But here we have an explicit provision that the federal courts shall take jurisdiction of suits between unions and employers for breach of collective bargaining agreements. Since the provisions relating to individual employees are at the heart of such agreements, and the statutory mandate is without exception or qualification, the mandate must be construed as conferring a right to sue for violation of such provisions. If there were any doubt, it would be removed by Section 301(b), which specifically authorizes a union to sue as an entity in the federal courts in behalf of all of the employees whom it represents in collective bargaining.

Finally, examination of the suits which have been brought under Section 301 in the past seven years makes it evident that the effect of the construction given to the statute by the Court of Appeals would be to exclude from the jurisdiction granted by Congress a major portion of that which was intended to be granted.

ARGUMENT

I—THE DISTRICT COURT HAD JURISDICTION

Section 301(a) provides that the federal district courts shall have jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . ." This simple language bristles with problems, as we shall show below. But, no matter how those problems are solved, certain elements at least are sufficient to bring a case within the statutory language. These elements are: (1) an employer engaged in commerce or in an industry affecting commerce, as defined in the Act[1]; (2) a labor organization representing the employees of such an em-

[1] The requirement that the employer himself be engaged in commerce is not specifically set forth in the statute, which, literally read, requires only that the contracting labor organization be one that represents employees who are so engaged and does not specifically require that this be true of the employees involved in the suit.

ployer[2]; (3) a contract between the employer and the labor organization; (4) a suit between the employer and the labor organization for claimed violation of that contract.[3] All of these, we submit, are present here.

The Court of Appeals here reached the conclusion that there was no jurisdiction under Section 301(a) through an analysis of the substantive rights of the parties in a collective bargaining agreement. It examined the older theories which had been developed to fit the unique tri-partite relationship involved in such an agreement into conventional common law concepts of contract, and declared that none of them were satisfactory. It then enunciated its own theory. Under this theory (called "eclectic" by the court) the collective bargaining contract between the company and the union was regarded as comprised of two distinct types of provisions: those provisions, such as the union shop or the checkoff, which provide benefits to the union or the collective group of employees as such; and those provisions, such as those governing the payment of wages, which provide benefits for the individual employees. Since, in the first kind of provision the company contracted with the union to accord certain benefits directly to it, failure to grant those benefits can be remedied by a suit on the contract by the union. The second kind of provision, however, the Court found to be quite different. The collective bargaining agreement is not a contract of employment: the union does not, normally, agree to furnish employees nor does it agree that any particular employees will agree to work. Similarly, the company does not agree to

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[2] This again is not literally required by the statute.

[3] There is a controversy as to whether the "between" in the statute refers to the suit or to the contract. See the opinion of the court below (R. 108), *United Protective Workers* v. *Ford Motor Co.*, 194 F. 2d 997 (7 Cir. 1952) and the cases collected in 17 A.L.R. 2d 614, 619 (1951). The resolution of this controversy is immaterial here, where both the contract and the suit are between the union and the employer.

hire any particular employees nor, indeed, does it normally agree that it will hire any employees at all. The agreement is simply that if there are persons who desire to work for the employer and if the employer agrees to employ them, they will be accorded the benefits provided for in the collective bargaining agreement.

This phenomenon, the Court said, means in legal terms that the union has made an agreement with the employer under which the employer is obligated "to include, as a term of each individual contract of hire, a promise to pay the . . . employee" in accordance with the provision of the collective bargaining contract. (R. 101-102.) Under this construction of the collective bargaining agreement the employer's duty to pay a particular employee arises, not out of the collective bargaining agreement, but out of the individual contract of hire incorporating that agreement. Since a failure to pay to the employees was the violation alleged in this case, the Court concluded that Section 301(a) was not involved and there was no federal jurisdiction, since there was no violation of a contract between an employer and a labor organization.

We will deal below with the merits of this "eclectic" theory of the rights of the parties under a collective bargaining contract. But here we question only the last step —the conclusion that there is no federal jurisdiction. In deciding jurisdiction we are not concerned, or should not be concerned, with the substantive rights of the parties or the correct interpretation of a collective bargaining contract. If the Court of Appeals is right in its theory—which we do not concede—all that is proven is that the plaintiff here, under a proper construction of the contract sued upon, does not have a cause of action. It is not proven that the District Court did not have jurisdiction, except in the strained sense that a court only has jurisdiction where the plaintiff is entitled to recover. While it is possible, perhaps, to define the concept of jurisdiction as

including only the cases where the plaintiff's claim is found justified, such a definition robs the concept of all utility and defeats the distinction between questions of jurisdiction and questions of substantive law.

If the Court of Appeals had said that there was no contract at all here, then perhaps it would be a little more accurate to say that, on that basis, the District Court had no jurisdiction. But the Court of Appeals conceded that there was a contract between the defendant and the plaintiff governing the payment of salaries to the employees. It construed that contractual provision as merely requiring the company to agree with the individual employees to pay them the specified salaries. It concluded, therefore, that the alleged failure to pay—once the individual agreements were made—was not a violation of the contract with the union but a breach of the agreements with the individual employees. But clearly this suit was brought by the union on a claim that the failure to pay the employees the salaries specified in the collective bargaining agreement was a violation of that agreement itself. That the Court of Appeals construed the action of the company as not constituting a breach of its contract with the union but a breach of its contracts with the individual employees does not mean that the District Court did not have jurisdiction over the suit but only that the union's claim lacks merit.

Suppose that a plaintiff brings suit alleging that the defendant has failed to perform his contract obligation to pay money to the plaintiff. Federal jurisdiction is based upon diversity. Suppose the defendant contends that the contract, properly construed, did not require the defendant to pay the plaintiff but only to procure the agreement of some third person, resident in the same state as the defendant, to pay. Would this argument, if sustained, defeat the diversity jurisdiction? Obviously not. The court

would have jurisdiction, but the plaintiff would lose his lawsuit.

Or suppose A sues B in tort for personal injuries, again basing jurisdiction on diversity. Surely B does not defeat the jurisdiction if he proves, on trial of the case, that it was not he but some third person, resident in the same state as the plaintiff, who committed the tort. Again, the court would have jurisdiction, but the plaintiff would lose on the merits.

So, in this case, there was a contract between the plaintiff union and the defendant company. The plaintiff claimed that the company's action in not paying the salaries specified in the contract violated the contract. The Court of Appeals held that it did not—that the salary provisions of the collective bargaining agreement did not require the company actually to pay the specified salaries but only to make agreements with the employees to pay them, and that, hence, the failure to pay the employees—once the appropriate agreements with them had been made—did not constitute a breach of the contract with the union. But this means only that the Court concluded that the plaintiff's claim was bad on the merits, not that the court was without jurisdiction of the claim.

That this conclusion is correct is made clear if we assume that Section 301(a) did not exist and jurisdiction here had been grounded on diversity of citizenship between the union and the company. Clearly, the question of whether a failure to pay the wages specified in the collective bargaining agreement was a breach of the written collective bargaining agreement with the union or of the oral contract of hiring of the individual employees would be a question of substance to be decided by reference to state law, not a procedural or jurisdictional question.

This was squarely held in *Moore* v. *Illinois Central R. Co.* 312 U.S. 630. The *Moore* case involved a discharge alleged to be in violation of a collective bargaining agree-

ment. Two issues were presented: (1) Whether the suit was barred by the statute of limitations, and (2) whether the plaintiff was required to exhaust his administrative remedies. The first issue depended on whether the individual's legal rights were deemed to rest on his oral contract of hire, adopting the terms of the collective bargaining agreement, or on the written agreement itself. The state statute of limitations on the former would be three years and on the latter six. The state court held that the individual employee could rest his claim on the written collective bargaining agreement itself and that, hence, the six-year statute applied. The case was then removed to the federal courts, the court of appeals, being of the opinion that the contract sued upon was the verbal contract of hire, held that the three-year statute applied. 112 F. 2d 959 at 964. This court reversed, holding that this was a matter of state law, on which the federal courts had to follow the decisions of the supreme court of the state.

The issue in this case, therefore, is not a jurisdictional one at all. To the contrary, it involves a substantive question of the most fundamental importance—the substantive legal rights of union, company and employee in the institution which we call the collective bargaining agreement. The question, it is true, is a generic one. The contractual theory which the Court of Appeals applied did not arise from the words or phrases of this particular collective bargaining agreement. The Court quite properly considered that the issue was one which concerned collective bargaining agreements in general and that it could not be resolved without "some fundamental probing into the reciprocal rights and duties, and the source thereof, of the three groups concerned in a collective bargaining contract." (R. 98.) The result of this probing, however, is not the resolution of a jurisdictional controversy but, to the contrary, a definition of the substantive legal rights which these three groups derive from the collective bargaining agreement.

We conclude, then, that the District Court clearly had jurisdiction over this case, since all of the elements required by Section 301(a) of the Taft-Hartley Act were present, including a claim that the collective bargaining contract between the company and the union had been violated. We turn now to the substantive question of whether a union has any legal interest in the performance of the provisions in a collective bargaining agreement specifying employee benefits.

II—THE QUESTION TO BE DECIDED HERE IS ONE OF FEDERAL SUBSTANTIVE LAW

1. *The Issue*

Before beginning any "fundamental probing into the reciprocal rights and duties" (R. 98) created by a collective bargaining contract, it is perhaps wise to ask whether we are free to probe at all. Perhaps we must accept the results of any prior probe which may have been conducted by the courts of Pennsylvania. The contract involved here was executed in Pennsylvania and was to be performed in Pennsylvania; if jurisdiction were based on diversity and there were no Section 301(a), the substantive rights of the parties clearly would have to be resolved by referring to the law of Pennsylvania. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64; *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941); *Transcontinental Air* v. *Koppal*, 345 U.S. 653 (1953).

The court of appeals was not seriously troubled by this possibility, and stated flatly that Section 301(a) created a substantive federal right. (R. 98.) But, in an earlier case under Section 301(a), the same court had said that a Pennsylvania collective bargaining agreement should be construed in accordance with Pennsylvania law.[4] The matter is certainly not free from doubt.

[4] *Paterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers*, 191 F. 2d 252, 253 (3rd Cir. 1951), which was recently followed in *Insurance Agents* v. *Prudential Insurance Co.*, E.D. Pa., Aug. 6, 1954, 34 LRRM 2678.

Section 301(a) is written in terms which appear to be exclusively jurisdictional. It provides simply that suits for violation of collective bargaining agreements may be brought in the district courts of the United States. It does not expressly state what law shall be applied. Since the section was passed, the question of whether the substantive rights to be enforced in a suit under it derive from federal or state law has been much litigated and discussed.[5]

Most courts have concluded that the section created a substantive federal liability for breach of a collective bargaining agreement and that considerations of state law are immaterial in cases brought under it. Thus, in *Shirley Herman Co.* v. *Hodcarriers Union*, 182 F. 2d 806 (2nd Cir. 1950), an employer sued a union under Section 301, claiming damages for a strike in violation of a collective bargaining agreement. Judgment was rendered against the defendant union and it appealed, arguing, among other things, that the plaintiff had not shown bad faith, as he was required to do under the law of New York in order to recover from a union for breach of a no-strike provision. The contention was rejected by the Court of Appeals for the Second Circuit, which held flatly that Section 301 created a generally applicable and uniform federal substantive right and that "state law as to bad faith is therefore of no relevance." 182 F. 2nd at 809.

A similar result has been reached by the Sixth Circuit in *Operating Engineers* v. *Dahlem Construction Co.*, 193 F. 2nd 470 (6th Cir. 1951), by the Ninth Circuit in *Schatte* v. *International Alliance of Theatrical Stage Employees,*

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[5] See, *e.g.*, Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 (1954); Hays, *Federalism and Labor Relations in the United States*, 102 U. Pa. L. Rev. 959, 975 (1954); Comment, *The Specific Performance of Collective Bargaining Agreements under Section 301(a) of the Taft-Hartley Act*, 21 U. Chi. L. Rev. 251; Note, *Section 301(a) of the Taft Hartley Act*, 57 Yale L. J. 630 (1948).

182 F. 2nd 158 (9th Cir. 1950) and by a number of district courts.[6]

The statement that Section 301 created a substantive federal right has often been made in response to a contention that the statute is unconstitutional under Article III of the Constitution since it seeks to give the Federal courts jurisdiction, irrespective of diversity of citizenship, over cases not arising under "the laws of the United States." See *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949). The courts have almost uniformly appeared to believe that the contention could be defeated only by rejecting its premise—that the substantive rights to be enforced in a Section 301(a) action are derived from state law.[6a]

It has been suggested, however, that there is another answer and that Section 301 can be constitutionally sus-

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[6] Boston & Maine Transp. Co. v. Amalgamated Ass'n, 106 F. Supp. 334 (D. Mass. 1952); Pepper & Potter, Inc. v. Local 977, 103 F. Supp. 684 (S.D. N.Y. 1952); Fay v. American Cystoscope Makers, 98 F. Supp. 278 (S.D. N.Y., 1951); Textile Workers v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D. N.C., 1950); Textile Workers Union v. Arista Mills Co., 193 F. 2d 529, 533 (4th Cir. 1951); Fitzgerald v. Dictograph Products, Inc., 28 LRR Man 611 (N.Y. Sup. Ct., 1951). State law has been followed, without discussion of the problem, in: Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers, 191 F. 2d 252 (3d Cir., 1951); Mercury Oil Refining Co. v. Oil Workers International Union, 187 F. 2d 980, 983 (10th Cir., 1951); Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge, 91 F. Supp. 596, 614 (W.D. Wash., 1950) *aff'd.* 188 F. 2d 356 (9th Cir. 1951).

[6a] United Electrical Workers v. Oliver Corp., 205 F. 2d 376 (8th Cir. 1953); Colonial Hardwood Flooring Co. v. International Union, 76 F. Supp. 493 (D. Md. 1948) *aff'd.* 168 F. 2d 33 (4th Cir. 1948); International Plainfield Motor Co. v. UAW, 34 LRR Man 2718 (D. N.J. 1954); Waiaula Agricultural Co. v. United Sugar Workers, 114 F. Supp. 243 (D. Hawaii 1953); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45 (D. Del. 1952); Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162 (S.D. N.Y. 1949). See Note, *Section 301(a) of the Taft-Hartley Act*, 57 Yale L. J. 630 (1948).

tained even if it be construed as merely conferring upon the federal courts jurisdiction to decide controversies based on the law of the states as to breaches of collective bargaining agreements.[7]

We do not propose to argue this constitutional issue here, since we believe that it will be found independently that Congress must have intended that Federal rather than State law would govern the substantive rights of the parties to collective bargaining contracts falling within the scope of the federal act. We merely point out that a serious constitutional issue would be raised if the statute were construed as a bare grant of federal jurisdiction.

2. The Legislative History

Although the legislative history of Section 301(a) is not conclusive with respect to the abstract question of whether Congress intended to make state or federal law applicable in suits brought under Section 301(a), the evidence that is available indicates that the proponents of the bill, at least in the Senate, intended to create a federal substantive law. The report of the Senate Committee noted, in urging that the proposed section be enacted, that there were then no federal laws creating a "substantive right" to sue unions for breach of contract.[8] The opponents of the bill, on the other hand, stated that state substantive law would be applicable under the proposed statute,[9] but this was stated as a premise for the argument that Section 301(a) was unnecessary and of doubtful constitutionality.

The legislative history does, however, make one thing clear: Congress intended to insure that collective bargain-

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[7] Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass., 1953); Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 184 (1953); Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 601 (1954).

[8] Sen. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 17 (1947).

[9] Sen. Min. Rep. No. 105, Pt. 2, on S. 1126, 80th Cong., 1st Sess. 14 (1947); H.R. Min. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 400 (1947).

ing agreements, once made, would be binding and enforceable. The House bill provided for suits in the federal district courts, very much as the enacted bill does except that the jurisdictional test, which in the House bill related to the effect on commerce of the contract in question, was made to depend on the status of the employer or the union.[10] The House report, although it seemed to assume that only unions violated contracts, left no doubt that its purpose was to make both parties "equally responsible . . . for contract violations." H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 6 (1947).

The Senate bill not only provided for "suits for violation of contracts concluded as the result of collective bargaining" but also provided that breach of such contracts, either by a union or an employer, should constitute an unfair labor practice. In explaining the provision authorizing suit the Senate Committee first said:

> "The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the Committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made. *(H. J. Heinz & Co.*, 311 U.S. 514)'" Sen. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 15 (1947).

The report then discussed the difficulties involved in

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[10] H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 65 (1947).

suing unions in the absence of a federal "substantive right" and concluded:

> "Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." *Id.* at 17.

And, in debate, Senator Taft described the purpose of Section 301(a) as follows:

> Mr. Taft: "What is the purpose of title III? The purpose of title III is to give the employer and the employee the right to go to the Federal courts to bring a suit to enforce the terms of a collective-bargaining agreement—exactly the same subject matter which is contained in titles I and II. It is impossible to separate them. The committee had difficulty even in separating matters as between titles, and moved some matters back and forth from one title to another." 93 Cong. Rec. 4141 (1947).

Although the proponents of the bill in both houses seemed to assume that the only significant issue was whether unions could be sued, there can be no question as to their intention to provide that both parties should have the right to bring effective suit.

3. *The Uncertain Status of Collective Agreements Under State Law.*

If there existed in the law of the various states a commonly accepted and understood concept of the collective bargaining agreement as an enforceable contract, then arguments could be made as to whether minor variations in that concept from state to state were intended to be retained in actions under Section 301(a) or whether, for the sake of uniformity in the enforcement of the national labor policy, a single federal law should obtain. But the significant fact, as this case shows, is that there was in

1947, and is now, no such common understanding as to the fundamental rights and duties, if any, which are created as between the three groups concerned in a collective bargaining agreement.

Collective bargaining agreements, unlike contracts for the sale of goods, contracts of employment, or negotiable instruments, had no accepted common law status. " Most of our courts have regarded them as illegitimate hybrids with no proper name or significance in our law." Gregory and Katz, *Labor Law: Cases, Materials, and Comments* 1152 (1948).

> "To attempt to write about or state 'the law of the collective bargain' . . . is to attempt to write about or to state something which does not exist. True, there are cases, perhaps a hundred or so all told. But there is no body of doctrine, in any sense of the word to which reference can be made to predict the outcome of as yet unsettled questions. It can hardly even be said that there are standards, let alone a frame of reference." Witmer, *Collective Labor Agreements in the Courts* 48 Yale L.J. 195, 238-239 (1938).

See also Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931).

This, of course, is not surprising. During the period when the common law developed our present concept of contract, the institution of collective bargaining was unknown. A contract of employment, defining the relationship between master and servant, was known and the law, developed formulae which fitted the observed phenomena. Thus, the respective rights of employer and employee were defined by the terms of the individual contract of employment. There had to be consideration and a mutuality of obligation. Unless the employee agreed to work for a fixed period of time he could not object if he were discharged without cause. Furthermore, for reasons inherent in the nature of this relationship, such a contract would not be specifically enforced, except that, where unique services

were involved, injunction against employment elsewhere might be granted to the employer.[31]

The institution of collective bargaining simply did not fit into this conventional contractual conception. The contract terms which would govern the employment of those who came within the bargaining unit were contained in a contract with a union which did not agree to perform labor itself, or even, usually, to provide persons who would perform labor. Nor, on the other hand, did the employer agree that he would hire any particular employees or even that he would hire or retain any employees at all. Finally, the contracting party—the union—was not a legal entity at all. It was an association of employees but neither the contract nor the union's internal rules usually bound the individual members to work under the contract.

To a common law court the collective agreement was not a contract of employment and, hence, was not a contract at all.

> "It appears to their Lordships to be intended merely to operate as an agreement between a body of employers and a labour organization by which the employers undertake that as regards their workmen, certain rules beneficial to the workmen shall be observed. By itself it constitutes no contract between any individual employee and the company which employes him. If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by [the union] against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied." *Young* v. *Canadian Northern Railway* [1931] A.C. 83.

See also *Swart* v. *Huston*, 154 Kan. 182, 117 P. 2d 576 (1941).

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[11] Restatement, Contracts §§ 379, 380 (1932). These principles were applied to a collective bargaining agreement by the Supreme Court of Ohio in 1953. Masetta v. National Bronze & Aluminum Foundry Co., 159 Ohio St. 306, 112 N. E. 2d 15.

Other courts resorted to various theories in an attempt to find some method of giving enforceable rights to the employees covered by collective agreements. The union was regarded by some as acting as an agent for its members. The contract could thus be regarded as just a group contract of employment, the union's function being simply that of an agent, not a party in interest. Other courts regarded the collective bargaining agreement as establishing a usage, or a custom, or a mutual general offer, which was regarded as incorporated into the individual contracts of employment executed by the employees.

> ". . . in itself it can rarely be a subject of court action because it is incomplete. It establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer to be closed by specific acceptances." *Yazoo & M.V.R. Co.* v. *Webb*, 64 F. 2d 902, 903-904 (5th Cir. 1933).

In this view, also, the union had no contractual interest—the operative legal "fact" was the individual contract of employment. The development of the concept of the third party beneficiary contract provided still another formula into which the collective bargaining contract could be forced and many courts utilized it so as to permit individual employees to sue as the beneficiaries of the contract between the union and the employer.

All of these theories have obvious deficiencies. We will discuss some of them later in this brief. The question here, however, is only whether Section 301(a) should be construed as making them determinative of the nature of the basic legal rights created by a collective bargaining agreement. We think it is almost nonsense to say that when Congress declared that "statutory recognition of the collective agreement as a valid, binding and enforceable

contract is a logical and necessary step" it meant only to provide a federal forum in which to enforce the varying rights, if any, which might accrue to the parties under the confusing and conflicting theories which have been adopted in the various states. These theories, furthermore, do not take account of the policies and provisions relating to the establishment and conduct of the collective barganing relationship which are contained in the National Labor Relations Act (Title I of the Taft-Hartley Act), 29 U.S.C. §§ 151-168. Obviously those provisions must be taken into account in analyzing the nature of the individual and collective agreements made under the Act. *See J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). As Senator Taft said, it is impossible to separate them.

We conclude then that Congress at least intended that collective bargaining agreements made under the federal act "should be enforceable in the Federal Courts," consistently with the federal provisions governing the collective bargaining relationship. In the light of the variations in state law with respect to the very status of these agreements as contracts, the right conferred by Congress must comprehend not only access to the federal courts but also the right to assert there that the agreement sued upon is an enforceable contract as a matter of substantive federal law.[12]

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[12] There are a number of questions not directly presented here whose resolution may depend upon whether a collective bargaining agreement is regarded as a mutual general offer. an agreement made by an agent on behalf of the individual employees, a third party beneficiary agreement, or an enforceable contract *sui generis*. Is consideration necessary? If not, does the doctrine of failure of consideration apply so as to permit one party to avoid his obligations because the other party has breached his? Is an agreement by an individual to work for less than the amount specified in a collective bargaining agreement contractually valid? If not, can an individual employee settle a claim for the wages specified in a collective bargaining agreement for less than the amount claimed? Can a union execute a collective bar-

III—THE EXISTING THEORIES AND THE COURT OF APPEALS "ECLECTIC" THEORY OF THE COLLECTIVE BARGAINING CONTRACT ARE UNSATISFACTORY

It has become routine to express dissatisfaction with the various theories which the courts have used to encompass the institution of collective bargaining within the traditional concepts of the common law.[13] Even in the absence of Section 301 (a) it could sensibly be argued that the provisions of the National Labor Relations Act requiring collective bargaining and "the execution of a written contract incorporating any agreement reached,"[14] constituted a sufficient basis for re-evaluating the legal status of the collective bargaining agreement. Certainly the questions determined, before Section 301(a) was enacted, in such cases as *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), and *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), are relevant to the determination of the status of such agreements in breach of contract suits. In 1945, Judge Sparks thought that by the National Labor Relations Act "the

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gaining agreement giving away an individual employee benefit which has accrued by virtue of an earlier collective bargaining agreement? Does the settlement by a union of outstanding claims of violation of a collective bargaining agreement preclude individuals from reasserting their claims? May an employee assert a claim that the collective bargaining agreement has been violated without first exhausting the grievance machinery established under the contract?

All of these questions are questions of substance, whose resolution is indissolubly connected with the legal status to be attributed to the collective bargaining agreement. But they are also questions that cannot properly be decided independently of the provisions of the National Labor Relations Act.

[13] See, e.g., Gregory & Katz, *Labor Law: Cases, Materials and Comments*, 1152-1163 (1948); Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L.J. 195 (1938); Anderson, *Collective Bargaining Agreements*, 15 Ore. L. Rev. 220 (1936); Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931).

[14] Section 8(d). 29 U.S.C. § 158(d). See also 29 USC § § 158(a) and 159(a) and H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

Union was given the right in its own name to bargain, and contract, and as an entity to enforce such contract in courts of law." *Pullman Standard Car Mfg. Co.* v. *Local Union No. 2928*, 152 F. 2d 493, 498 (7th Cir. 1945) (dissenting opinion). Now, however, we have a Congressional command that the collective bargaining agreement be recognized "as a valid, binding and enforceable contract." All the more reason, therefore, for re-assessing existing doctrine.

1. ***The Older Theories.***

The view, typified by *Young* v. *Canadian Ry. Co.*, *supra*, that the collective bargaining agreement can create no actionable rights in either the union or the employee must, by hypothesis, be rejected.

The usage or custom theory, probably the most widely accepted of the older theories, did give some contractual force to the collective bargaining agreement, although indirectly. The collective agreement was not considered as itself a contract, but its terms were made enforceable by regarding them as a usage incorporated in the individual contract of employment. An employee who was not paid in accordance with the agreement or who was denied some right, such as seniority, provided for in the agreement thus had an enforceable claim against the employer based not on the collective bargaining agreement, but on the individual contract of employment incorporating that agreement.

> ". . . we now enter into a consideration of the contract that did exist between appellant and the railway company. . . . That contract was between the union and the railway company alone. . . . Having been signed by appellee, it is evidence of its intention, in the conduct of its business with enginemen on said division, to be governed by the wages and rules, and for the time therein stipulated. . . . There is on its face no consideration for its execution. It is therefore not a contract. It is not an offer, for none of its terms

> can be construed as a proposal. It comes squarely within the definition of usage as defined in *Byrd* v. *Beall*, 150 Ala. 122, 43 South, 749, 124 Am. St. Rep. 60. . . . It follows, therefore, that all appellee assented to in signing that agreement was that it would adopt and maintain the rates of pay and regulations, and for the period of time, therein stipulated, in its dealings with enginemen employed by it on its Chattanooga Division of its railway.
>
> "If appellant, during the time limit provided in said agreement, entered the service of appellee as engineman on its Chattanooga Division, knew and assented to the provisions of said agreement, or if they were so generally known among enginemen as to justify the presumption that he did know them, and made no express contract in conflict with any of its provisions, the agreement in question entered into and became a part of his contract with appellee, as if fully incorporated therein." *Hudson* v. *Cincinnati*, N.O. & T.P. Ry. Co., 152 Ky. 711, 714-717, 154 S.W. 47, 48-50 (1913).

See also *Illinois Central R. Co.* v. *Moore*, 112 F. 2d 959 (5th Cir. 1940) *revd.* 312 U.S. 630; *Yazoo & M.V.R. Co.* v. *Webb*, 64 F. 2d 902 (5th Cir. 1933).

As the Court below pointed out, the usage or custom theory had the obvious deficiency that it assumed the necessity of showing that the employee had knowledge, or reason to know, of the usage or custom.[19] (R. 101.) Furthermore, the theory "must view the collective agreement as not a contract at all," (R. 100) and this contradicts the hypothesis upon which Section 301(a) is based.

The agency theory, too, cannot stand careful analysis. It is typified by the language of the Minnesota Supreme Court in *Mueller* v. *Chicago & N.W. Ry. Co.*, 194 Minn. 83, 85, 259 N.W. 798, 799 (1935):

> "But it is plain that, the contract having been made by the representatives of the brotherhood on behalf

[19] Is this necessarily true of a custom, as opposed to a usage? See Rice, *op. cit. supra*, note 13.

> of the 'employees in train, engine and yard service,' plaintiff is entitled to sue on the contract as one made in his behalf by a duly authorized agent; that is, this suit must be considered as one by a party to, rather than by a mere beneficiary of, the contract."

and the language of a recent New Jersey case:

> "A collective bargaining agreement is the joint and several contract of the members of the union made by the officers of the union as their agents." *Kennedy* v. *Westinghouse Electric Corp.*, 25 N.J. Super 601, 603, 96 A. 2d 720, 721 (1953), *revd. on other grds.* 29 N.J. Super. 68, 101 A. 2d 592 (1953).

This theory does not explain how the contract is applicable to non-members of the union (although this perhaps could be remedied by construing the Act as conferring a statutory agency on the union to represent all the employees in the bargaining unit.) Furthermore, an employee who had revoked the agent's authority to represent him, would not be bound by an agreement reducing an individual benefit accrued under an earlier agreement. Compare *Piercy* v. *Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923) with *Hartley* v. *Brotherhood of Railway Clerks*, 283 Mich. 201, 277 N.W. 885 (1938). And an individual who contracted directly with the employer for a wage less than that prescribed in the union contract would be bound by his personal agreement. Compare *Langmade* v. *Olean Brewery Co.*, 137 App. Div. 355, 121 N.Y. Supp. 388 (4th Dept. 1910) with *Elrod* v. *Luckenback Steamship Co.*, 28 LRR Man 2046 (N.Y. City Ct., 1951). This, too, could perhaps be remedied by construing the federal act as vesting in the union an exclusive agency which no individual could revoke, or waive. But, once we do this, the agency concept becomes entirely fictional.

Apart from these considerations, the agency theory rests on the misconception that the collective bargaining agreement is a contract of employment.

> "Whether it be a contract between the defendant

and one employee or a large group of employees, it is still an employment contract and must be construed and enforced in accordance with the well-established law relating to employment contracts." *Masetta* v. *National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 311, 112 N.E. 2d 15, 18 (1953).

But, as has been frequently pointed out in the cases adopting the usage theory and by this court,[15] the collective bargaining contract is not a contract of employment at all. The employer does not agree to hire anyone and the union does not agree, on behalf of anyone, that he will work. Even under the older agreements (now illegal by virtue of Section 8(a)(3) of the Taft-Hartley Act)[16] under which unions agreed to furnish members who would work,[17] the employer-employee relationship was established by the individual action of the worker and the act of hiring by the employer. Collective bargaining agreements "neither create the employment relationship nor do they deal exclusively with it." Lenhoff, *The Present Status of Collective Contracts in the American System*, 39 Mich. L. Rev. 1109 (1941).[18]

Unlike the two theories already discussed, the third party beneficiary theory rests on a recognition that the collective bargaining agreement is a valid contract and that the union is a party to it in its own right. In some states which have adopted this theory, the use of the third party

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[15] J. I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

[16] 29 U.S.C. § 158(a)(3). See, e.g., Daniel Hamm Drayage Co., 84 NLRB 456 (1949) *enforced*, NLRB v. Daniel Hamm Drayage Co., 185 F. 2d 1020 (5th Cir. 1951).

[17] *E.g.*, Goldman v. Cohen, 222 App. Div., 631, 227 N.Y. Supp. 311 (1st Dept. 1928); Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 887 (1936); American-Hawaiian S.S. Co. v. Sailors Union of the Pacific, 37 F. Supp. 828 (N.D. Cal. 1941).

[18] Writing in 1941, Professor Lenhoff states as already achieved by the law a recognition of the union's interest in enforcing all of the provisions of the collective bargaining agreement. The cases, unfortunately, do not fully support his optimistic account.

beneficiary notion followed recognition of the right of the union itself to sue for enforcement, even as to wage scales. *Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N.Y.S. 401 (1st Dept. 1922); *Hudak* v. *Hornell Industries*, 304 N.Y. 207, 106 N.E. 2d 609 (1952); *but cf. Kaufman* v. *M. T. Davidson Co.*, 22 LRR Man. 2531 (N.Y. Sup. Ct. 1948).

In a sense it is true, perhaps, that the individual employee derives benefits from the collective agreement "somewhat as a third party beneficiary." But, as the court below implied, to label the collective agreement a third party beneficiary agreement in the conventional sense, is highly misleading. Certainly we do not have the conventional third party beneficiary situation where one party to a contract supplies consideration to the other, in return for which the other contracting party agrees to provide benefits to some third person. The employee who works under a collective bargaining agreement cannot reasonably be described as a creditor beneficiary, and it is hard to conceive of the wages paid to him as being a gift to a donee beneficiary rather than as a return for the labor performed. Cf. Restatement, Contracts (1932) § 133. The employee is not a beneficiary at all but, simply, a worker whose employment, and compensation for work performed, is governed by the collective bargaining agreement which his union has negotiated.

The third party beneficiary theory, furthermore, may run into some of the same difficulties as the agency theory.

> "After a contract for the benefit of a third person has been accepted or acted on by such third person beneficiary, the contract cannot be rescinded by the parties without his consent: It follows, as an immediate corollary, that such third party beneficiary cannot be compelled to accept or act on the contract made for his benefit. He may forego his opportunity for benefits under that contract and continue to work under another agreement with his employer and accept the compensation stipulated in that agreement."

Huston v. *Washington Wood & Coal Co.*, 4 Wash. 2d 449, 452, 103 P. 2d 1095, 1097 (1940).

Cf. *McDonald* v. *Wockner*, 267 P. 2d 97 (Wash., 1954) ("Anti-Kickback" statute).

2. The "Eclectic" Theory.

After reviewing these older theories, the court below rejected them and announced its own, which it termed "eclectic." (R. 100.) Essentially this theory involved adoption of the usage-custom theory, but substitution of the National Labor Relations Act for the usage or custom. Under the National Labor Relations Act, it is clear that the collective agreement covers all employees for whom the union is the statutory bargaining representative. Hence, the court below said, the terms of the collective agreement are incorporated into the individual contracts of hire not because of custom or usage but "because the law says so." (R. 101.)

The second difficulty with the usage theory—the absence of any contract with the union as such—the court met by dividing the collective agreement into two parts: those provisions dealing with subjects such as wages and hours which provide a "direct benefit to the individual" (R. 103) and those, dealing with such matters as "lockout, union shop, arbitration, and safety conditions" (R. 103), which provide benefits running in favor of the union as such. The second category, comprising the benefits running to the union, made the agreement into a contract, the union's promises—primarily the promise to refrain from conducting strikes—furnishing the consideration for the employer's promise to confer benefits directly upon it.

The fallacy of this separation of the collective agreement into two parts is made plain by the court's own examples. The benefit of a provision relating to arbitration obviously "runs in favor of" the individual employee just as much as does the contract section on which the individual grievance to be arbitrated is based. Provisions relating to "safety conditions" surely cannot be described as for the union's

benefit and only "incidentally" for the benefit of the employees. An employee who is locked out, or whose shop has run away, would be surprised to learn that this is only of incidental interest to him. Most of these provisions, in fact, have been made the basis for suits by individual employees as beneficiaries of the collective bargaining agreement.[20]

The only provision in the usual collective bargaining agreement which can be even argued to "run only to the benefit of the union and . . . not to the benefit of the individual employee" (R. 103) are those dealing with the union shop and the checkoff. (And where there is a union shop, the checkoff is a direct benefit to the individual employees. See Appendix A of this brief, p. 67.) Essentially then, the "eclectic theory" rests on a conception of the collective bargaining agreement as a bargain between the union and the employer, pursuant to which the union makes certain promises to the employer and those promises furnish consideration only for the employer's promise to enforce the union shop. If we disregard the other examples cited by the court of appeals, this is almost precisely what it said. (R. 103-104.)

The underlying factual assumption that a union makes its deal, gets a promise for dues, and silently steals away, to appear again only at the next contract negotiation, is completely false, as we shall demonstrate later. But even if it were true in some cases, this view can hardly pass muster as a theory of collective bargaining contracts unless it can be said that union security provisions are an essential element of every collective bargaining agreement. And this, of course, is untrue on its face. Many collective

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[20] See, *e.g.*, Tennessee Coal, Iron & R.R. Co. v. Sizemore, 258 Ala. 344, 62 So. 2d 459 (1952) (safety provision); Faultless Caster Corp. v. United Electrical Workers, 119 Ind. App. 330, 86 N.E. 2d 703 (1949) (lockout; individual co-plaintiffs). *Cf.* Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S. 2d 709 (3d Dept. 1954 *aff'd.* 306 N.Y. 966, 120 N.E. 2d 227 (1954) (arbitration).

bargaining agreements do not contain such provisions. The duty to bargain collectively, set forth in Section 8(d) of the Act,[21] speaks of bargaining about "wages, hours and other terms and conditions of employment." The National Labor Relations Board, in describing the basic elements in a collective bargaining agreement, did not even specifically mention union security provisions. National Labor Relations Board, *Written Trade Agreements in Collective Bargaining* (1939) 39-41 (reproduced as Appendix B to this brief). And the contract here sued upon does not contain a union security provision.[22] Surely, a collective bargaining agreement does not cease to be such or fail for lack of consideration if it omits such a provision.

The separation made by the Court of Appeals does not, in short, help to solve the problem which the Court posed —the reciprocal rights and duties of the three groups concerned in a collective bargaining contract—since it finds the essence of the contractual relationship in portions of the contract which are not essential to it.

It is possible, however, to disregard this aspect of the Court's opinion and, addressing ourselves directly to its treatment of the employee benefit provisions of the agreement, to find a contractual theory. This theory is that the collective bargaining agreement constitutes a promise by the employer to agree in turn with the employees to accord them the specified benefits in return for their labor. The collective bargaining agreement is thus a contract, and perhaps an enforceable one, but only a contract to insert certain provisions in the individual contracts of hire. Except that it is automatically applicable to the employees and presumably cannot be revoked, the contract is the

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[21] 29 U.S.C. § 158 (d).

[22] It does contain a checkoff provision but that provides that dues are to be checked off only pursuant to written and revocable authorizations by the employees (R. 11). The union thus has no contractual right of its own to receive any dues beyond those which the employees individually contract to pay.

same as Judge Sibley's "mutual general offer"[23] and follows almost explicitly the 1913 theory of the Supreme Court of Kentucky, quoted *supra* at pp. 26-27.

This theory, if it is correct, would presumably give the union a cause of action if the employer attempted openly to violate the collective agreement by hiring at less than the specified rate or by executing individual agreements otherwise at variance with the collective agreements. But simple failure to perform, whether deliberate or due to a dispute as to the meaning of the collective agreement, would give rise only to a cause of action in the affected employees.

The theory has a certain superficial attractiveness. It is neat. It accounts for most of the conceptual objections to prior formulations. We have recognition, of a sort, of the collective agreement as a contract. We also have recognition that it is not a contract of employment and that the wages and other benefits prescribed in it are only payable to the employees as a result of their taking jobs which the employer is free to provide or not. By regarding the collective agreement as a contract to incorporate the specified terms in the individual contracts of employment most of the difficulties of the agency and third party beneficiary theories are overcome. Presumably, the individual contracts would be deemed to incorporate the provisions for change or termination set forth in the collective agreement so that changes in wage rates, etc., in that agreement after the initial hiring would be regarded as automatically inserted in the individual contracts.

Although the individual contracts which the theory posits are almost entirely fictional, the model is not internally inconsistent. It violates no generally accepted propositions of law. And it appeals, perhaps, to lawyers

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[23] Yazoo & M. V. R. Co. v. Webb, 64 F. 2d 902, 904 (5th Cir. 1933).

who are otherwise unable to account in conventional terms for the phenomenon known as the collective bargaining agreement.

There is only one difficulty—the theory does not fit the phenomenon. It misses, in fact, the essential attributes of the institution which it is supposed to describe. Only those without any knowledge of the facts of collective bargaining could say, of this theory: "So it is in the shop." (R. 101.)

We turn now to an examination of these facts.

IV—THE NATURE OF THE COLLECTIVE BARGAINING PROCESS REQUIRES THAT THE UNION BE REGARDED AS HAVING A CONTRACTUAL INTEREST IN THE PERFORMANCE OF THE COLLECTIVE AGREEMENT.

1. *The Nature of the Collective Bargaining Process.*

A reading of the cases dealing with collective bargaining agreements makes it clear that all of them, in some measure, rest upon some preconception of the nature of the collective bargaining process.[23a] In making our argument here, therefore, we thought it would be useful to present to the Court an economic analysis of the nature of the collective bargaining process, as it has developed under the National Labor Relations Act. That analysis, which has been prepared by an authority in the field and which draws upon the published works of other recognized authorities, is attached to this brief as Appendix A. In addition, we have printed as Appendix B a portion of a 1939 study by the National Labor Relations Board entitled "Written Trade Agreements in Collective Bargaining," and, as Appendix C, we have photographically reproduced the descriptive introductory portion of the Bureau of Labor Statis-

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[23a] E.g., Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 152 Ky. 711, 1545 W. 47 (1913); Yazoo & M. V. R. Co. v. Webb, 64 F. 2d 902 (5th Cir., 1933); Yazoo & M. V. R. Co v. Sideboard, 161 Miss. 4, 133 So. 699 (1931).

tics' Bulletin No. 908-16, entitled "Collective Bargaining Provisions: Grievance and Arbitration."

From these materials, and from the provisions of the National Labor Relations Act and the decisions under it, we think it is proper to draw certain conclusions, which we will set forth here summarily.

Congress has declared that unions selected by a majority of employees for the appropriate units shall be the exclusive representative of employees for the purpose of collective bargaining.[24] The concept of collective bargaining is not limited to the negotiation of a formal collective bargaining agreement. To the contrary, the collective bargaining relationship is a continuing one. Under the Wagner Act it included bargaining during the term of an agreement concerning proposed changes in that agreement.[25] Since the Taft-Hartley amendments, the collective bargaining during the term of an agreement must assume as its fixed premise that there shall be no changes in the terms of the agreement.[26] This does not mean, however, that collective bargaining does not exist during the contract term. To the contrary, there is a permanent organized relationship between the union and management constituting a system of day-to-day private industrial government. And the statute expressly recognizes that collective bargaining includes the negotiation of questions arising under the agreement.[27]

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[24] 29 U.S.C. § 159(a).

[25] NLRB v. Sands Mfg. Co., 306 U. S. 332, 342 (1939); NLRB v. Newark Morning Ledger Co., 120 F. 2d 262, 267 (3rd Cir. 1941); Lone Star Gas Co., 18 NLRB 420, 444 (1939).

[26] 29 U.S.C. § 158 (d). See Allied Mills Inc., 82 NLRB 854 (1949).

[27] ". . . to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement, *or any question arising thereunder*. . . ." 29 U.S.C. § 158(d) (emphasis added).

The formal collective bargaining agreement represents a settlement in outline of the basic constituents of the permanent day-to-day relationship. But this settlement cannot possibly deal with the myriad details of actual application; it acquires meaning and content only by virtue of a process of administration and interpretation. In this process management is necessarily the moving party in the first instance—it applies the agreement by hiring, firing, directing the working forces and paying wages. But the union participates actively in the process through the filing and processing of grievances claiming that management's actions violate the agreement. It is in the processing, adjustment and settlement of these grievances that the continuing collective bargaining relationship takes place.

In the typical collective bargaining agreement—as in the agreement involved in this case—the steps in the grievance procedure after the initial complaint are taken by the union. The union's actions in taking these steps are part of its statutory responsibility as the collective bargaining representative. As stated in *Hughes Tool Co.*, 104 NLRB 318, 326 (1953):

> "The prominent part which grievance handling plays in the representation of employees is readily apparent. As the Board has stated previously, 'Grievances are usually more than mere personal dissatisfactions or complaints of employees and their adjustment frequently involves the interpretation and application of the terms of a contract or otherwise affects the terms and conditions of employment not covered by a contract.'[18] The adjustment of grievances, viewed in the larger aspect, constitutes, to a great degree, the actual administration of a collective-bargaining contract.
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> "The importance of grievance presentation and

"[18] Bethlehem Steel Company, Shipbuilding Division, 89 NLRB 341 at 344.

adjustment as a part of the representation of employees is also noted in the statute. Section 2(5) of the Act observes that a labor organization exists for the purpose, among others, of dealing with employers concerning grievances.[19] Section 9(a), as will be more fully discussed hereinafter, specifically recognizes the critical position grievance presentation and adjustment occupies in the relationship between the employee and the employer, the representative and the employer, and the employee and the representative. We find, therefore, in accord with the views of the Fifth Circuit court that 'The handling of grievances . . . is part of the business [a certified union] has assumed and must be done with impartiality.' "[20]

"[19] Section 2(5) states. in full, 'the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with emloyees concerning grievances, labor disputes, wages. rates of pay, hours of employment, or conditions of work.'

"[20] Hughes Tool Company, v. NLRB, 147 F. 2d 69 (C.A. 5, 1945), dealing with the issues of whether an employee may call in a representative other than the certified union to represent him in grievance procedures and the scope of the certified union's right to participate in presentation and adjustment of grievances brought by individuals. At the Board hearing, however, an offer of proof to the effect that the certified union had refused to handle grievances filed by members of other unions was rejected. On this subsidiary point the court noted that 'We think a meritorious grievance is entitled. if desired, to the aid and countenance of the bargaining representative. If the griever is a member of another union and cannot be represented by his own union, it is the more necessary that he have the aid of the representative.' On the same point, the court added, 'When the [certified union] accepted certification as the bargaining representative for the group, it accepted a trust. It became bound to represent equally and in good faith the interests of the whole group [citing the Steele case, *supra*] . . . It ought not discriminate in the execution of its duties between its own members and employees who belong to another union or to no union'."

Congress has specifically dealt with the relationship of the individual employee to the grievance procedure. In

Section 9(a) of the Act, as amended in 1947, it provided that an employee should have the right to present his grievance individually and have it adjusted, but this right was expressly subjected to two conditions: (1) the adjustment must be consistent with the collective bargaining agreement and (2) the union must be given an opportunity to be present.[28] As the Board has said, Congress thus balanced the individual's interest with "the representative's interest in preserving intact the terms and conditions of its contract and its right to bargain about such terms."[29]

As a final step in the continuing collective bargaining relationship there may be provision for the arbitration of disputes which are not resolved in the grievance procedure. Here again the union is the protagonist, on one side of the table, in a proceeding which determines and defines the rights of the employees.

2. *The Contradiction between the Decision of the Court Below and the Collective Bargaining Process.*

If the propositions we have set forth above are accepted, and we do not believe that they are susceptible of substantial dispute, it is immediately apparent that the "contract to make a contract" theory of the court below is based upon a fundamenal misconception of the collective bargaining process.

In the court's view, the union has completed its function as the bargaining representative of the employees when the formal agreement is signed. It has no further legal interest as a party except with respect to the provisions providing benefits directly to it. The relationship between the employees and the employer during the term of the agreement is governed by the individual contracts of hire. Although those individual contracts are deemed by the law to include the benefits specified in the union's con-

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[28] 29 U.S.C. § 159(a).

[29] Hughes Tool Co., 104 NLRB 318, 327.

tract, they stand separate and apart from it. If a dispute arises as to whether the proper wages or other benefits have been accorded, that dispute is a dispute between the individual employee and the employer. If they are not able to resolve the dispute and a suit is brought, the employee and only the employee has a legal interest sufficient to bring such a suit.

This conception obviously cannot square with the practice of collective bargaining or with the law governing it. Once we accept, as we must, the proposition that collective bargaining is a continuing process, and that the settlement of grievances is part of that process, then the legal requirement that in collective bargaining the union chosen by the majority is the exclusive representative of all necessarily excludes the view that the individual employee owns, and owns exclusively, the right to bring suit upon his grievance.

For a suit for breach of contract is, in essence, the same thing as a grievance. In form, both are complaints that the employer has breached his agreement; but in reality both perform the function of resolving disputes as to the proper interpretation and application of the agreement. A legal theory that excludes the collective group—the union—from the suit at law is, we believe, incompatible with a system in which the collective group participates, and indeed controls, the processing of a grievance.

The incongruity of the legal analysis of the court of appeals is made plain when we consider in detail the interrelationship between the suit at law and the grievance procedure. Is the suit an alternate, or a complement, to the grievance procedure? That is, should exhaustion of all of the steps of the grievance procedure be required as a necessary preliminary to legal action by a union or an employee for breach of the collective agreement? Although the cases arising under state law are in conflict on this

question,[30] we think the answer is plain that exhaustion of administrative remedies is required.[31] Conceptually, this follows from the fact that the very collective bargaining agreement which specifies the rights to be accorded the employees also specifies the procedure to be followed in adjudicating any dispute as to these rights. Under any legal theory of the collective bargaining agreement, the first can stand no higher than the second. Examination of the institution of collective bargaining leads to the same result. The law governing day-to-day relationships between employer and employee is developed, as we have shown, through the grievance procedure. It constitutes the accepted method by which the broad terms of the agreement are related to specific events occurring in the plant. To hold that this machinery can be ignored and suit brought on the bare terms of the contract would not be to enforce the relationship which the parties have agreed upon but to disrupt and perhaps destroy it.

Let us examine the consequences of this view. If the lawsuit is a complement to the grievance procedure, it cannot be held the right asserted in that lawsuit is a right arising solely out of the individual's contract of employment and independent of the union's rights under the collective agreement. For so to hold would be to attach to the tail end of a process a set of legal values wholly at variance with those that prevail during the process. At all stages of the grievance procedure settlements and agree-

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[30] Compare, *e.g.*, Dufour v. Continental Southern Lines. 68 So. 2d 489 Miss. (1953), and Latter v. Holsum Bread Co., 108 Utah 364, 160 P. 2d 421 (1945), with Pettus v. Olga Coal Co., 72 S.E. 2d 881 (W. Va. 1952), Hudak v. Hornell Industries, 304 N. Y. 207, 106 N. E. 2d 609 (1952), and Taschenberger v. Celanese Corp., 34 LRR Man 2305 (Md. Circuit Ct., 1954).

[31] This Court has so held with respect to suits involving interpretation of a collective bargaining contract under the Railway Labor Act. Slocum v. Delaware L. & W. R. Co., 339 U. S. 239 (1950). In discharge cases, state law governs. Transcontinental Air v. Koppel, 345 U. S. 653 (1953).

ments are reached. Indeed, that is the very purpose of setting up a procedure with a number of steps. Some settlements are made by compromise. In others the grievance is granted by the employer. In still others the union concedes that the employer s action was proper under the contract. All of such settlements are made by the union as the chosen, and exclusive, collective bargaining representative of the employees. Its right to make such settlements must be assumed to be as broad as its right to make other agreements [32] (and to be subject to the same qualifications[33]). But if this is so, then the right to bring a lawsuit after the grievance procedure is exhausted arises not only from the individual contract of employment but also from the union's action in processing the grievance.[34]

If we assume the opposite view—that a suit can be maintained without exhausting the grievance procedure—we come to the same result. In this view, the suit at law is an alternate method of processing a grievance. But if we hold that the individual has the sole right to maintain and conduct the law suit we immediately contradict the basic premise of the National Labor Relations Act. For this would mean that he could adjust his grievance, via a law suit, without the presence of the collective bargaining representative[35] and even though the result might be inconsistent with the meaning of the basic agreement, as both of the parties who negotiated it have interpreted it. This

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[32] *Cf.* Justice Frankfurter's statement, in dissent, with respect to the railway industry that "the whole course and current of the . . . trade union relationships imply that the interest of the individual member as to issues arising under the collective agreement is entrusted to his chosen representative." Elgin, J. & E. R. Co. v. Burley, 327 U.S. 655, 676 (on rehearing, 1946).

[33] See Steele v. L. & N. R. Co., 323 U. S. 192 (1944); Ford Motor Co. v. Huffman. 345 U. S. 330 (1953).

[34] A graphic illustration is provided by the holding in Trimble v. Robertshaw Thermostat Co., 73 D. & C. 239, 31 West. 283 (1949).

[35] See, *e.g.* Nichols v. National Tube Co., 34 LRRM 2183 (D.C., N.D. Ohio 1954).

flies directly in the face of Section 9(a) of the Act. Finally, it would mean that an employer, in disagreement with a union, could bargain out a settlement of a law suit which would provide different benefits than those provided for in the agreement. But this is scarcely consonant with the established rule that the employer may not make individual wage agreements with the employees in derogation of the collective bargaining agreement. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944).

We conclude, then, that the conception of the court below—that the right to receive the benefits specified in the collective bargaining agreement derives solely from the individual contract of employment, incorporating the terms of the collective agreement, and that the union merely contracts that he shall have that individual right—contradicts the basic premise of the collective bargaining relationship prescribed by the Act.

3. *The Legal Interest of the Union.*

The purpose of the argument above was to show the error of the theory that assigns to the individual employee the sole legal interest in the enforcement of the employee benefit provisions of the collective agreement. It necessarily follows from that argument that the union must be regarded as having a separate and distinct legal interest in such enforcement.

This legal interest is of two kinds. First, there is the union's statutory interest in the proper interpretation of the agreement. This interest goes beyond the particular employees involved. Each grievance, each arbitration and each lawsuit necessarily establishes precedent in the interpretation of the agreement which will have an effect on the whole group represented by the union. The Court of Appeals expressed a sense of shock because the effect of permitting the union to sue here might be to secure an interpretation of the agreement which would bind the individual employees, particularly if the union lost on the

merits. (R. 105.) But this hardly seems shocking, since the union is not only charged with the responsibility of negotiating the contractual terms for the individuals in the first place, but also charged with the responsibility of negotiating concerning their interpretation. What is shocking is the converse. If the union has no right to sue, then the individual employee who does sue will, in effect, bind the collective group by obtaining a judicial determination of the meaning of the contract.

Even where there is no question of interpretation involved, the union has a distinct interest in the enforcement of the collective agreement. Any violation of the agreement constitutes an injury to the collective group which is in addition to, and apart from, the damage suffered by the individual employees affected.

This is so because one of the essential benefits which the employees as a group obtain from the collective relationship is the substitution of a rule of law for the possibility of arbitrary action. A provision in a collective agreement defining the requirements for receiving, say, holiday pay does more than give a particular individual the right to receive such pay. It establishes the principle that those who meet the conditions shall receive the benefit and those who do not will not. The rule is to be the same for one employee as the next and it is to be the same on one holiday as the next.

The benefits of the rule of law established by the collective agreement are not one-sided. It fixes the employer's liability for the duration of the agreement with respect to the items covered in the contract. In addition, it places the responsibility for the denial of claimed benefits in particular cases upon the agreement which has been accepted by the group. An employee who claims that, in all fairness and justice, he should receive an increase in wages for the work he is doing or more pay for holiday work, is politely—and properly—referred to the bargained settle-

ment of those issues contained in the collective agreement.

When an employer violates the collective agreement, he does more than damage the particular individual involved. He violates the rule of law established by the agreement and he deprives the group as a whole of one of the benefits for which it has bargained. The union in bringing suit to redress the individual's grievance is thus also bringing suit to obtain the *quid pro quo* for which it has contracted.

The matter can be put in the terms suggested by the court of appeals. When an employer executes a collective bargaining agreement he does not promise the union merely to include the specified provisions as a term of each individual contract of employment. He promises, rather, that in his employment of individuals he will uniformly observe and abide by certain agreed upon rules. Those rules may also constitute the terms of the individual contracts of employment. But that is not just what the union bargains for. It also bargains, in the words of the contract here, for a commitment "to administer the provisions of this Agreement in good faith" (R. 9).

V—SECTION 301 REQUIRES THAT THE UNION BE GIVEN THE RIGHT TO SUE HERE

Our argument thus far as to the nature of the collective bargaining relationship would be sufficient, we believe, to justify a common law court of general jurisdiction in coming to the conclusion, as some have, that a union has a sufficient legal interest in the collective agreement to bring suit to enforce it. But here we have a specific statutory mandate. And that, we submit, should remove any doubt.

1. *The statutory language and history.*

Congress did not, in Section 301, enact a theory of collective bargaining contracts. It left the theory to the courts. As we have already pointed out (*supra*, pp. 18-20) it said simply that it wanted to accomplish "statutory rec-

ognition of the collective agreement as a valid, binding and enforceable contract."[36] To do this, it provided in subsection (a) of 301, that the federal courts should have jurisdiction over all suits for breach of contracts between unions and employers subject to the Act. Section 301 (a) we think is sufficient to establish that the union may sue to obtain redress for breach of any of the provisions of the collective bargaining agreement. In so doing it vindicates its own interest in securing performance of the promises which the employer has made to it.

But if there were any doubt, the very next subsection—Section 301(b)—should set that doubt at rest. 301(b) gives the union the right to sue to vindicate the individual rights of the employees arising out of the collective agreement. It does not just say that a union may sue as an entity in the courts of the United States. That would give it legal capacity to appear for its members only. It says that the union may sue as an entity "and in behalf of the employees whom it represents."

We need not contend that this provision constitutes the union as the agent *ad-prosequendum* of the employees for all purposes. Cf. *Rock Drilling, etc., Hod Carriers' Local Union No. 17* v. *Mason & Hanger Co.*, 90 F. Supp. 539 (S.D. N.Y. 1950). We think that what it means is that in the collective bargaining area—the area in which the union chosen by the majority of the employees is elsewhere in the statute given exclusive authority to represent all of them—it shall also have authority to sue on their behalf. This must mean, if it means anything, that the union is given authority to seek redress for the failure of an employer to pay to the employees the salaries promised in the collective bargaining agreement.

2. *The Practical Effect of the Decision Below.*

A decision that unions may sue under Section 301(a)

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[36] Senate Rept. No. 105 on S. 1126, 80th Cong., 1st Sess. 17 (1947).

only for benefits running to them "as such" deprives the section of much of its usefulness. If the Court of Appeals is right, almost half of all the cases which have been brought in the federal courts under Section 301(a) should have been dismissed on jurisdictional grounds. It is, of course, impossible to make an accounting of every case which has been brought under the section, but there are a sufficient number of reported decisions so that an accurate estimate of the frequency of various kinds of suits filed under the section can be made.

We have attempted to examine every reported decision in which a suit for breach of contract under Section 301(a) was involved. We have been able to find 65 different cases. The distribution of these cases is, perhaps, surprising. In 25 cases, suit was brought by the employer against a union. In most of those the breach alleged was a strike in violation of a no-strike clause. In 2 cases, suit was attempted to be brought, unsuccessfully, by individual employees. In one case, one union sued another. The number of cases brought by unions far outshadowed the other categories. Unions brought 37 cases against employers. The decisions are listed, by category, in Appendix D of this brief.

The great majority of cases brought by unions arose from the alleged failure of the employer to accord to employees benefits claimed due under the collective bargaining agreement. In only 7 of the 37 cases in which unions were plaintiffs was the issue solely whether the employer had failed to provide the contracted for benefits to the union, and in 4 of those cases the benefit involved was payment to a welfare or sick benefit fund. In the three other union benefit cases the controversy arose not because of any employer reluctance to perform but because of a controversy as to which of two contesting unions was entitled to the check-off and recognition. In addition to these 7 "union benefit" cases, there were 3 others in which

the issue was whether the entire collective bargaining agreement was still in effect. In the remaining 25 cases[37] the root of the controversy was the alleged failure of the employer to accord rights specified in the collective agreement to an employee or employees.

These figures do not, of course, prove that the courts should have taken jurisdiction in these 25 cases. They do show, however, that the practical effect of the decision below would be to eliminate from the scope of the section a major area of its usefulness and the principal area in which it provides benefits to employees. The result would be virtually to convert Section 301(a) from a section providing that collective bargaining contracts shall be "equally . . . enforceable"[38] to a section providing that they shall be enforced solely against unions.

CONCLUSION

For the reasons above stated, the judgment of the Court of Appeals should be reversed and the cause remanded to that Court for a determination as to whether the action of the District Court in dismissing the complaint on the merits was proper.

Respectfully submitted,

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[37] In two cases, the nature of the basic controversy was not stated in the reported opinion.

[38] Senate Rept. No. 105 on S. 1126, 80th Cong., 1st Sess. 15 (1947).

APPENDIX A

THE STRUCTURE OF THE COLLECTIVE BARGAINING PROCESS*

INDEX—SUMMARY

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D. Enforcement interests of the union generally 65

V. Some theories as to the place of enforcement in the collective bargaining processes can be subjected to criticism on the following grounds:

A. These theories seek to compartmentalize the provisions of the collective agreement as between

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* Prepared by Jack Barbash, consulting economist, Washington, D. C., formerly: staff director U.S. Senate Subcommittee on Labor and Labor Management Relations; economist, New York State Department of Labor, National Labor Relations Board, War Production Board, U.S. Department of Labor, Amalgamated Meat Cutters and Butcher Workmen of North America.

Author, *Labor Unions in Action* (1948); *Unions and Telephones* (1952); *"Ideology and the Unions"*, 33 American Economic Review 868 (1943); "Ethnic Factor in the Development of the American Labor Movement" in Industrial Relations Research Association, *Interpreting the Labor Movement* (1952); U.S. Senate Subcommittee on Labor and Labor-Management Relations, 82nd Congress, 2nd Session, (staff report) *The Problem of Delay in Administering the Labor-Management Relations Act* (1952).

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those which benefit the individual employee and those which benefit the union. This compartmentalization is wrong in theory and practice as is revealed by an examination of specific provisions (by way of illustration) which are supposed to run only to the benefit of the union:

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   c. Grievance arbitration provides a large measure of assurance that individual grievances will not be settled on an *ex parte* basis 72
4. By the same token the union as a union has a vital interest in compliance with the wage provisions of the contract which in the disputed theory are presumed to be of interest only to the employee. The most important of these is the interest of the union (and the employer too) in standardization of wage conditions within a plant and between plants. An individual grievance is in fact therefore something more than the personal problem of an employee but is related intimately to the intra-plant and interplant balance of equities 73
5. Seniority provisions which affect the status of an employee in relation to other employees in a unit affect seriously both the employee and the group 76
6. The compartmentalization theory is defective because it seeks to impose an abstraction of dubious validity in any case, to the concrete realities of the work-a-day world of collective bargaining 76

B. The theory that the union's interest in enforcement lapses at the point of contract agreement, with respect to the category of provisions which are alleged to be of primary benefit to the em-

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ployees, is defective because (as we have demonstrated earlier):

1. Collective bargaining is a continuous and integrated process which only *begins* with the making of an agreement and necessarily includes administration, application and enforcement of the agreement 78
2. The union as bargaining agency is the major focal point of interest on the employee side of the bargaining relationship throughout the *entire* collective bargaining process with respect to *all* of the provisions of the agreement 78
3. It is therefore absurd to argue that with respect to any particular category of contract provisions the union *can* act as the party at interest in enforcement through the grievance machinery and through arbitration, but that it cannot act as a valid party at interest with respect to necessary subsequent enforcement of these provisions in the courts 78

VI. Although the interest of the bargaining agency in collective bargaining is paramount the individual employee or union member is not without substantial remedy to vindicate his rights 78

A. Union government is characterized by a system of due process through which the individual employee and/or union member can influence outcomes within the limits of representative government 79

B. If he is denied these rights or discriminated against in the exercise of these rights he has specific remedies in the courts and the National Labor Relations Board 80

C. In any case the individual employee can work with like minded associates in removing the existing bargaining agent 83

VII. The *quid pro quo* in collective bargaining is:

A. For the union, the employer's maintenance of the terms of the agreement; For the employer the abridgement of the union's right to strike during the life of the agreement 83

B. But something more as well. For the employer and the union it is a commitment to each other to abide by and enforce for each of their respective sides, the rules of a form of industrial government set in motion by the making of the agreement, for the duration of the agreement 84

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THE STRUCTURE OF THE COLLECTIVE BARGAINING PROCESS

I

INTRODUCTORY

The purpose of this analysis is to describe the collective bargaining process as a going institution of industrial society, and having accepted standards of common practice. We rely for the facts of the collective bargaining process on the writings of reputable authorities in the field of labor-management relations. The emphasis of this presentation is on:

(a) The role of the union in collective bargaining,

(b) The interconnections between the component phases of the collective bargaining process,

(c) The nature of the three way relationship in collective bargaining between (1) union and employer, (2) union and employee, and between (3) employee and employer.

The institution of collective bargaining is peculiarly susceptible to the type of treatment contemplated here. Although there is by now a substantial body of law on the subject, the legislative mandates which have given force to the public policy with respect to collective bargaining and which have regulated it have necessarily been broad. The administrative agencies and the courts have consequently had to rely on observation of the process at work as the main guidepost in interpreting the legislative mandate. It is the shape and form of this process at work which constitutes the subject matter of this presentation.

II

ACCEPTANCE AND ENCOURAGEMENT OF COLLECTIVE BARGAINING AS PUBLIC POLICY

No extensive documentation is required to demonstrate that the institution of collective bargaining is approved and encouraged as a matter of public policy.

The concluding paragraph of the findings and policies of the Labor Management Relations Act, 1947, reads:

"It is hereby declared to be the policy of the United

States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." [Italics added.]

III

THE PRIMARY RELATIONSHIP ESTABLISHED BY COLLECTIVE BARGAINING IS BETWEEN UNION AND EMPLOYER

At the root of the relationships established by collective bargaining is the relationship between the union and the employer, rather than the relationship between the employee and the employer. Frederick Harbison puts this very pointedly: "First, collective bargaining is strictly *a relationship between organizations*. Contrary to a mistaken belief in many quarters, collective bargaining is not a relationship between management and workers." [1]

As stated by Alexander Hamilton Frey, "The unitary aspect of organized workers is an essential element of collective bargaining." [2]

This basic theme is reiterated in a U. S. Library of Congress report for a Senate committee. "There is no collective bargaining if unions do not do the bargaining for the employees. Thus the acceptance of the union is a fundamental condition of collective bargaining." [3]

This fundamental concept was crucial in the legislative history of the majority rule principle embodied in Section

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[1] "Collective Bargaining and American Capitalism," in Kornhauser, Ross and Dubin, *Industrial Conflict* (1954) *italics in original.*

[2] "Democracy, Free Enterprise and Collective Bargaining," in Matthews, *Labor Relations and the Law* (1953) 45.

[3] Peck, *Factors in Successful Collective Bargaining*, Report of the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, U.S. Senate 82nd Congress, First Sess. (1951) 27.

9(a) of the National Labor Relations Act (Wagner Act) and carried over in the Labor-Management Relations Act, 1947 (Taft-Hartley law).

Section 9(a) of the Wagner Act reads:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employers.

The Taft-Hartley Act retained this language in identical form but added the following:

> ". . . and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect: Provided further, that the bargaining representative has been given the opportunity to be present at such adjustment."

The hearings and debates leading to the enactment of the Wagner Act are replete with criticism of the majority rule principle but when the bills were finally reported out of both the House and Senate committees, the exclusive representation principle was retained. Not only was it retained but it was ardently defended against the criticisms.

> "In view of what has been said, it is apparent that those who oppose majority rule in effect oppose collective bargaining and the making of collection [sic] agreements as the end thereof, by seeking to create conditions making such accomplishments impossible. Those who profess to favor collective bargaining and the general purposes of this bill should favor majority rule, which is the only practical method of achieving the desired ends. Majority rule is at the basis of our democratic institutions. The same organized employer groups who now oppose majority rule for workers have publicly announced their adherence to it as applied to the formulation of codes of fair competition. It has been the experience of the National Labor Relations Board in cases before it that employers opposing majority rule wished only to keep their

responsibilities diffused and to maintain in the picture a complacent minority group, typically a company union, so that no collective agreement might be reached at all. This motivation has been brought to the surface in specific cases where employers refused to recognize the rule when trade unions represented the majority, although in the course of the previous history of the disputes in question, when the opposing employer-promoted company unions had a majority, the employers had invoked the majority rule as the excuse for their refusal to deal with the same trade unions." *(Legislative History of the National Labor Relations Act,* 1935, Volume II, House Report No. 1147 on S. 1958, pp. 3071-2. See also Senate Report No. 573 in S. 1958, at 2312 ibid.)

The legislative intention to retain the principle of exclusive representation by the majority was clearly demonstrated in the adoption of the successor Labor-Management Relations Act, 1947.

Senator Taft stated in the course of the Taft-Hartley debate:

". . . originally, before the passage of any of these laws, the employer undoubtedly had an advantage in dealing with his employees. He was one man; the employees might be thousands; and he could deal with them one at a time. In negotiations of that character he had such a superior advantage that Congress came to feel that it must legislate specifically in order to correct that situation and bring about a balance. . . . Congress passed the Wagner National Labor Relations Act in order that the employees of a single employer might act as one in dealing with one employer, in order that they might be on a sound and an equal basis, a principle which I think no one can question, and which certainly is not questioned in the pending bill.

• • •

"The National Labor Relations Act was enacted for a proper purpose, . . . It was simply for the one purpose of equalizing, or permitting a large group of employees to act as one; in effect to compel them to act as one if the majority desired such action.[4]

[4] 93 Cong. Rec. 3834 (1947). See also pp. 4361, 4446, 4580, 4675, 7536-7537.

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". . . The pending bill retains without limitation, the power of collective bargaining, the power of employees to choose their own representatives, the power to deal with their employer as one man; and if they can get a majority, all the other employees have to keep quiet and permit the representative of the majority to bargain with the employer for all of them. We intend to retain all the benefits of the labor legislation which has been enacted since the twenties.[5]

Similarly, the House Report states:

"Like the present act, this clause of the amended act would make representatives chosen by the majority of the employees in a bargaining unit the exclusive representative of all the employees for the purpose of collective bargaining.[6]

Miss Ruth Weyand's discussion is so highly illuminating on this point that it merits quoting at length:

"Indeed, the terms in which Congress by the Taft-Hartley Act delineated the powers of individual employees with respect to their grievances makes it clear that Congress intended all employees in the unit to be bound by any collective bargaining agreement and did not intend individual employees or groups of employees to negotiate contracts respecting wages, hours or terms of employment after a bargaining representative had been duly selected. The proviso to Section 9(a), as amended, supplements the right to present grievances given by the proviso in the original Act by according to employees the additional right to have such grievances adjusted without the intervention of the bargaining representative as long as the adjustment does not conflict with any collective bargaining contract and so long as the bargaining representative has been given the opportunity to be present at such adjustment. By requiring that any grievance adjustment made by an individual conform to the provisions of any existing collective bargaining contract Congress in effect legislated specifically that all employees in the unit are bound by the collective agreement and cannot enter into any arrangements with their employer for other terms, either with respect to claims accruing for past violations or with respect to terms to be observed for the future.

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[5] 93 Cong. Rec. 4194 (1947). See also p. 4361.

[6] H. Rep. No. 245 on H. R. 2020, 80th Cong., 1st Sess., p. 34. Cf. also pp. 22, 33.

"Similarly, the writing into the grant of exclusive bargaining power to the statutory representative of a limitation thereon, that employees should have the right to present and adjust grievances, shows Congress believed it was granting to the statutory representative the power to exclude all bargaining by individuals. For if individuals were to be free to bargain there would have been no need expressly to accord them the limited right to present and adjust grievances set forth in the proviso. Likewise the terms in which the limitation on the statutory representative's power to preempt the bargaining field are cast negative any grant to individuals of bargaining rights. For the language used, 'present and adjust grievances,' whatever its exact meaning may be, certainly is not phrased in the language Congress would have used had it intended to allow individual bargaining even in instances where the terms of the bargain do not conflict with the collective agreement." [7]

IV

COLLECTIVE BARGAINING IS AN INTEGRATED AND CONTINUING PROCESS

Collective bargaining is a closely integrated process which does not, as is sometimes mistakenly assumed, end with the negotiation of an agreement between the union and the employer. On the contrary, the negotiation of the agreement is only a part of the process and frequently not the most important part.

This essence of collective bargaining as a *continuous* process and the indivisibility of that process is stressed again and again by authoritative students of the field.

Observe Daugherty and Parrish in a widely used labor text book:

"In the broadest sense collective bargaining is a term which may be used to describe this fundamental process of adjustment and accommodation between management and organized labor. Thus conceived, it embraces all the relationship between the two Houses [i.e., union and management] within the area which both have agreed covers their direct face-to-face dealings. It includes not only the periodic negotiation of new labor agreements but also the

[7] "The Scope of Collective Bargaining under The Taft-Hartley Act" in *New York University First Annual Conference on Labor* (1948) p. 269.

day to day relationship between the parties to the agreement as they live under it, interpret it and enforce it on themselves and on each other. In short, it covers the whole range of institutional, organized, direct relationships between the parties." [8]

Or in Davey's formulation:

"As used here, the term 'collective bargaining' is employed to cover the entire range of organized relationship between unions and management, covering the negotiation, administration, interpretation, and application of collective labor agreements.

"This elastic usage is employed to stress the important fact that collective bargaining provides a system for continuous organized relationships between management and unions." [9]

The concept of collective bargaining as a *continuing* process has received judicial approval, as for example:

". . . Collective bargaining is thus seen to be a *continuing and developing process* by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. *It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result.* Section 7, as we have seen, guarantees to employees the right to organize and engage in concerted activities for the purpose of collective bargaining. This right must necessarily continue so long as the prospect of future bargaining remains. It will thus be seen that the act guarantees to employees the continuous right to maintain labor organizations for the purpose of collective bargaining, after the signing of a particular collective bargaining agreement as well as before." [10]

There are several ways of classifying the successive phases of this continuing collective bargaining process. Davey, characterized these phases as "negotiation, administration, interpretation and application . . ." [11]

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[8] *The Labor Problems of American Society*, 494 (1951).

[9] *Contemporary Collective Bargaining*, 6 (1951).

[10] *National Labor Relations Bd.* v. *Newark Morning L. Co.*, 120 F. 2d 262, 267 (3rd Cir. 1941.) [Italics added.]

[11] *Contemporary Collective Bargaining*, p. 6 (1951).

A. The Negotiation Phase of the Collective Bargaining Process

The content of the negotiation phase of collective bargaining is well established in law and common practice, and consequently needs no detailed elaboration here, except to note the normal content of the collective agreement.

The discussion of a National Labor Relations Board report on the content of the collective agreement (reproduced as Appendix B) divided the agreement into "roughly four sections:" [12]

> "First there is a preamble which sets forth the principles of the agreement, sometimes with a pledge of mutual good will and confidence. This section also describes the processes of collective bargaining and indicates the status of the union, i.e., explicitly grants union recognition. A second section of the agreement enumerates specific conditions of employment. Wages and hours are given in detail together with other provisions. A third section of the agreement provides for its administration and interpretation. Finally, there is provision for duration and renewal."

Shulman, speaking from a record of distinguished experience as a teacher of the law and as an impartial umpire in labor-management disputes, has noted the interdependence of the agreement on the successive links in the collective bargaining process.

> " . . . the resulting collective agreement covers only a small part of their joint concern. It is based on a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to attempt to list in the agreement. It is similarly impractical, if not impossible, to attempt to anticipate and provide against all possible future contingencies. Yet there is usually lacking even a common understanding as to the general effect of the agreement. Doubtless the parties believe that the agreement is binding with respect to its express provisions. But what of the numerous matters of mutual interest with which the provisions do not deal? Is the employer free to take such action as he pleases? Or is he prohibited from taking any action without the prior consent

[12] *Written Trade Agreements in Collective Bargaining* (1939).

of the union—or at least without prior negotiation? Is the union free to make demands with respect to such matters? To use otherwise legal methods of persuasion or coercion to secure them? Or is the collective agreement the exclusive catalog of the employees' rights; and what is the significance of past practices? Rarely does the agreement specifically answer these fundamental questions; and quite frequently the parties actually have different notions about them."

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"Many illustrations can be cited. Negotiators can readily agree that the employer should have the power to discipline for cause. But they would probably negotiate for years without reaching agreement on all matters that should or should not constitute proper cause and what specific penalties should be appropriate in the diverse circumstances.

"Negotiators can generally agree that 'merit and ability' should be a factor, perhaps the paramount factor, in promotions. But they are likely to leave the agreement with quite different notions of what is meant by 'merit' and by 'ability' and how the factors are to be established."[13]

B. Grievance Adjustment Phase of the Collective Bargaining Process

The administration and enforcement phase of collective bargaining is essentially the grievance procedure, the process by which the terms of the contract are applied to individual situations on a case-by-case basis.

1. Structure and Function of Grievance Systems

An authoritative description of the structure and function of grievance machinery has been prepared by the U. S. Bureau of Labor Statistics. This study sets forth:

(1) The purpose of grievance machinery—"to interpret and apply the agreement clauses and give realistic and practical significance to many of its provisions. It is the medium through which employees may protest any alleged or real injustices caused by management in exercising its functions";

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[13] "The Role of Arbitration in the Collective Bargaining Process", in University of California, Institute of Industrial Relations, *Collective Bargaining and Arbitration*, pp. 21, 22 (1949).

(2) The function of the grievance machinery—fact-finding, judicial or interpretive and legislative;
(3) Pattern of grievance procedures—first stage, crystallization and presentation of grievance; second stage, (if not settled at first stage), negotiation between union representative and higher management; final stage, arbitration;
(4) The need for agreement on (a) definition of grievance, (b) representation on grievances, (c) appeals procedure, (d) arbitration.[14]

2. The Grievance System As the Heart of Collective Bargaining

It is well recognized that the grievance procedure is indispensible to the collective bargaining process, and that, indeed, collective bargaining cannot function at all without some system for adjustment of disputes under an agreement.

Hill and Hook from extensive experience on the management side of collective bargaining term the grievance procedure as the "core of the collective bargaining agreement." [15] Russell Smith states that the "grievance procedure is one of the most universal and important provisions in the collective agreement." [16]

A lawyer (Harry Shulman) and an economist (Neil Chamberlain) with extensive backgrounds in labor relations assert:

> ". . . the heart of the collective agreement—indeed, of collective bargaining—is the process for continuous joint consideration and adjustment of plant problems. And it is this feature which indicates the great difference between the collective labor agreement and commercial contracts generally. The latter are concerned primarily with 'end results'; the former, with continuous process." [17]

A decision by the National War Labor Board of World War II stresses the same basic theme:

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[14] U. S. Bureau of Labor Statistics, *Collective Bargaining Provisions, Grievance and Arbitration Provisions*, Bulletin No. 908-16 pp. 1-4 incl. (1950).

[15] *Management at the Bargaining Table*, p. 199 (1945).

[16] *Labor Law—Cases and Material*, p. 1028 (1950).

[17] "Cases on Labor Relations" reproduced in Shister, *Readings in Labor Economics and Industrial Relations*, p. 153 (1951).

"Collective bargaining is not confined to the making of an agreement once a year. It is also a day-to-day process and, on this score, the grievance procedure plays a highly important role." [18]

3. Grievance System As Industrial Government

The grievance machinery has evolved in labor-management relations to the point where it has been visualized (as one writer put it) as "system of *daily* industrial government." [19] And in the words of another authority the grievance procedure "represents the acceptance in labor-management relations of the fundamental notions of due process, and of the virtues of an orderly method of adjusting disputes. The decisions rendered through the established procedure tend to become the industrial case law for the plant." [20] Shulman sees the grievance procedure as "the orderly, effective and democratic way of adjusting disputes within the framework of the collective labor agreement. It is the substitute of civilized collective bargaining for jungle warfare." [21]

4. The Paramount Right of the Bargaining Agency In The Grievance System

What one observer has called "the paramount right of the bargaining agency" is the hallmark of the functioning grievance machinery so far as the employee side is concerned.[22] This means in effect that insofar as the employee grievances are concerned, the union is the institution which is the major party at interest.

The principle as stated by Chamberlain takes this form:

"As itself a party to the contract, it [the union] pos-

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[18] *Chrysler Corporation* [*Detroit, Mich.*] and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO.* 10 War Labor Reports, 551, 554 (1943).

[19] Isadore Katz, "*Minimizing Disputes Through the Adjustment of Grievances*" 12, *Law and Contemporary Problems*, 252 (1947). [Italics in original].

[20] *Labor Law—Cases and Materials*, 1029 (1950).

[21] Quoted in Chamberlain, *The Union Challenge to Management Control (1948)* p. 85-86.

[22] "Minimizing Disputes Through the Adjustment of Grievances" 12 Law and Contemporary Problems 255 (1947).

sesses an interest in maintaining the vitality of the compliance system which is at least as great as the individual employee's interest in seeking redress for personal injury. This position has been effectively advanced by Professor Harry Shulman of the Yale Law School who, from a varied background of arbitration experience, wrote in one grievance decision: 'When the Union processes an employee's grievance, it acts in the dual capacity of representative of the employee and party to the proceeding. It is not merely in the position of counsel for the employee. It is itself a party in interest . . . It is the Union—not the employee—which has the authority to process, and to process, and to determine whether to process, appeals from dispositions in the lower steps of the grievance procedure'." [23]

And as stated by Frieden in a National War Labor Board opinion:

> "It is true that the union settlement of a grievance presented directly by an employee may not be as advantageous to him as he would want or even as he might be able to obtain. But providing only that the union has not acted in bad faith, such a result is an integral part of any system of majority rule and is no justification for subverting the collective bargaining process." [24]

A central reason for the primacy of the union in the grievance machinery is the frequency with which individual grievances involve a subsequent group interest. According to Taylor:

> "It should be emphasized here, however, that the so-called individual grievance frequently involves considerable group interest, particularly when its disposition gives particular meaning, connotation, or substance to a term of the labor agreement. Disposition of many of these grievances is a vital aspect of collective bargaining . . . grievance arbitration frequently involves much more than a simple application of the terms of a labor agreement." [25]

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[23] *The Union Challenge to Management Control*, p. 237 (1948).

[24] NWLB Case No. 111-9715D quoted in Bakke and Kerr, *Unions, Management and the Public*, p. 136 (1948).

[25] "The Voluntary Arbitration of Labor Disputes", University of Michigan Law School, *Lectures on the Law and Labor-Management Relations*, p. 192 (1951).

C. The Arbitration Phase of the Collective Bargaining Process [26]

Arbitration is the capstone of the grievance procedure and as such is therefore of the warp and woof of collective bargaining process. The interconnections have been well stated by Taylor:

> "An important key to the understanding grievance arbitration is to realize that while collective bargaining starts with the negotiation of an agreement, it *necessarily* continue in the settlement of many grievances. They are the difficult grievances. Negotiation or arbitration of grievances should not 'add to' the labor agreement in the sense that new basic terms are incorporated; nor should a clear agreement of the parties be modified. During the life of an agreement, however, grievance settlements will inevitably add important substance and significant meaning to the terms that are in agreement. Grievance settling, by its very nature, fills out the understandings expressed in the contract which are inherently incomplete. Clear and unmistakable answers to many day-by-day problems covered by a particular clause are commonly not found in that clause. If they could be disposed of by direct application of the clause, there would be no real reason to submit them to arbitration." [27]

Shulman makes the same point:

> "For arbitration is an integral part of grievance adjustment during the term of the collective agreement. Its character, its quality, its purpose and function are all determined by the attributes of that process." [28]

The importance of grievance arbitration is attested by the fact that 89 percent of the contracts in effect in 1952 studied by the U.S. Bureau of Labor Statistics contained provisions relating to the arbitration of grievances.[29]

As to the scope and breadth of grievance arbitration,

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[26] See p. 69ff. *infra* for further discussion.

[27] Taylor, "The Voluntary Arbitration of Labor Disputes" in *The Law and Labor Managament Relations*, p. 189-9 (1951). [Italics in original.]

[28] "Collective Bargaining and Arbitration", Institute of Industrial Relations, Univ. of California, p. 25.

[29] *Arbitration Provisions in Collective Agreements*, 1952; 76 Monthly Labor Review, p. 261 (1953).

Chamberlain observes: "Under most grievance arbitration systems *all* the provisions of the agreement, with few exceptions, are subject to final interpretation by an authority other than the legal management." [30]

D. The Problem of Court Enforcement of Collective Agreements

Enforcement generally, of collective bargaining responsibilities, whatever form that enforcement takes is indispensable to the integrity of the collective bargaining process. As Robert Hoxie remarked more than a generation ago: "Neither side can afford to bargain where it cannot depend upon the enforcement of the contract." [31]

The doubtful position of the union in the courts with respect to enforcement of contract violations has called forth criticism from lawyers and economists alike who have studied this problem. These authorities have criticized what might be called the cultural lag of some courts in seeking to fit the labor-management agreement into the inflexible mold of legal categories devised for relationships far removed from the realities of the collective bargaining relationship.

Gregory has observed in this connection:

> "Just what rights can a union secure under a collective agreement and just what obligations does it assume? . . . To begin with, management has everything, and the agreement represents the whittling down of management's rights, due to collective bargaining. Most of these concessions are made on behalf of the employees, to govern the terms of their personal contracts of employment, and are not promises of benefits to the union as such. About the only things that unions get for themselves are recognition, some form of union security like the union or the preferential shop, and the right to initiation fees and union-dues check-offs, with possible controls over apprenticeship and the like. For breaches of these commitments, unions have been permitted to maintain actions against employers, including suits brought to require the return of runaway shops. The employees themselves have to sue for the enforcement of the other terms of these agree-

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[30] Op cit., supra note 23 at p. 108, italics added.

[31] "The Nature of Collective Bargaining" in Shister, *Readings in Labor Economics and Industrial Relations*, p. 150 (1951).

ments, concerning wages, seniority and the like. . . . The resulting cumbersome and costly recourse to the courts is a case of arrested development, which would be serious if employers and unions had not worked out the practical solution of voluntary arbitration." [32]

V

WHAT ARE THE BOUNDARIES OF ENFORCEABLE UNION INTERESTS IN COLLECTIVE BARGAINING?

The theory of enforcement which Gregory criticizes merits further analysis. This theory comes to this set of propositions.

(1) Contractual provisions may be divided between those which benefit the union and those which benefit the employee;

(2) The union may only assert its interest by way of legal enforcement, with respect to the provisions which benefit the union as such. A union may not assert its interest by way of legal enforcement with respect to those provisions which are of benefit to the employees.

As Gregory suggests, provisions relating to union security, checkoff, etc., are assumed under this theory to run to the union's benefit, while wage provisions are assumed to run to the benefit of the individual employee.

The treatment in this analysis does not presume to deal with the legal defensability of this theory. It is worthwhile, however, to examine how the theory stands up against the logic of collective bargaining practice as we have developed it here.

The terms of the agreement cannot be feasibly compartmentalized for the purposes sought by this theory. As Chamberlain has said: "The line between wage and non-wage issues, and between issues that do and do not bear a direct relation to 'wages, hours, and conditions of labor' could probably be drawn no more satisfactorily and precisely by a legislature than it has been drawn in practice at the bargaining table and by labor relations boards." [33] The clear implication of

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[32] *The Collective Bargaining Agreement: Its Nature and Scope*, 6 Labor Law Journal 455 (1950). See also Pierson, *Collective Bargaining Systems*, p. 58 (1942).

[33] *Op cit., supra*, note 23, at p. 153.

the Chamberlain analysis is that no significant lines can be drawn.

Moreover, the administration of the contract frequently involves more than whether a particular employee has received his due. Collective bargaining and especially the administration and enforcement of the contract through a grievance procedure has earlier been characterized as a form of "industrial government", and disputes which arise in the process of government do not therefore occur in isolation.

Accordingly, as Pierson has noted:

> ". . . The disposition of certain controversies may establish important precedents; they may affect an unusually large group of workers; or they may concern questions of a basic nature. Indeed, they sometimes raise the doubt whether collective relations between an employer and union will continue at all; for an agreement may be completely disrupted by struggles over a general reduction in wages or over a change in the method of computing piece-rates or over an effort by the union to circumvent the procedure for handling disputes." [34]

Now, to explore the merits of this compartmentalization with respect to specific provisions of the contract.

1. Check-Off Offers Benefits to Employees

Consider the checkoff as an example of a provision whose benefits, it is argued, run to the union only and not to the employee. To be sure, unions regard it of importance as an assurance of income. But there are obvious advantages to the employees as employees, particularly where there is a union security provision, as Witney has noted:

> "From the point of view of the individual worker, the checkoff provides a simple and convenient method for the payment of union obligations. Assuming that the worker intends to remain in the labor union, he must meet his financial obligations under any circumstances. Where membership in the union is made a condition of employment, the payment of union financial obligations becomes the prerequisite to the holding of a job. If a union-security arrangement prevails, and in the absence of the checkoff, the worker who for some reason fails to make his required union payment might lose his job.

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[34] Pierson, *Collective Bargaining Systems* (1942) p. 10-11.

> "Unless a worker objects to the check-off on psychological grounds, this method of collection appears to serve his interests. Actually the 'psychological' objection to the check-off has very little validity in the current period. Other financial obligations are deducted from his pay check; for example, payments for income tax and social security. Accordingly, the checkoff system for the payment of union obligations equally serves the interests of the worker. The only possible exception to this rule would relate to a circumstance in which the worker does not intend to remain in the organization. Where he must belong to a union to hold a job, the worker would not seriously contemplate going in arrears in his union financial obligations." [35]

McNatt has observed that the check-off "for the union member may provide a more convenient way of meeting his union obligations." [36] McNatt adds:

> "The theory that union members do not approve of check-off requirements negotiated by their union officers and would reject such requirements if they were free to do so, has proven to be as erroneous as the union shop election theory or the theory of voting on the employer's last wage offer." [37]

The check-off as "a convenience to the men", that is, the employees, was given by the National War Labor Board as the reason for directing the inclusion of such a provision in a collective agreement.[38]

In addition the Taft-Hartley law (Sec. 302(c)(4) requires the execution of an individual check-off authorization by each employee if the check-off provision of a contract is to become effective as to him. The employee is under no legal compulsion to sign such an authorization even though there may exist a union security provision and a check-off provision in the contract.

2. Benefits To The Employee In Union Security Provisions

The union security (i.e. union shop, etc.) provisions are

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[35] Witney, *Government and Collective Bargaining*, p. 351 (1951).

[36] *"Check-Off"* 4, Labor Law Journal 123 (1953).

[37] Id. at p. 124.

[38] *The Texas Co.* and *Oil Workers International Union Local 25 (CIO)*, 7 War Labor Reports 415.

also put by some in the category of benefiting the union only. It is possible of course that the term of art—"union security" —may furnish a semantic justification for inferring that such "union security" provisions run only to the benefit of the union and not to the benefit of the employee, but the justification is purely semantic as the facts reveal.

There are some very compelling facts on this point. Before the Taft-Hartley law was amended in 1951 a government directed poll was required among the employees to *authorize* the union to request a union security provision. A union, in order to legally request a union shop provision from an employer was required to secure the approval of a majority of the employees eligible to vote in the bargaining unit.

In the period August, 1947 to October, 1951, the NLRB conducted 46,119 union shop authorization polls. The union shop was authorized in 44,795 of these polls, or 97.1 percent. Put another way, more than 5½ million valid votes were cast, of which something more than 5 million were cast for the union shop, or 91 percent[39] Whitney concluded from these data:

> "Results of the polls indicate that workers in overwhelming numbers believe that all who share in the fruits of collective bargaining should assume its obligations and responsibilities and suggest an indorsement by workers of the point of view that union membership as a condition of employment is the prerequisite for effective, stable and responsible labor organizations. In addition, the outcome of the elections indicates that, in many unions, workers operating through the internal procedure of their unions have much to say about the substance of labor contracts negotiated by their representatives. Union shop polls conducted by a government agency merely confirmed that which already had been decided upon in the union hall."[40]

3. Employees Benefit from Grievance Arbitration

The conception (under the theory that we are analyzing) that arbitration offers no substantial benefit to individual employees covered by a contract is fundamentally erroneous.

First, the kinds of grievances which are arbitrated go over-

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[39] 16 NLRB Annual Report 301.

[40] Witney, *"Union Security,"* 4 Labor Law Journal 107 (1953).

whelmingly to the personal problems of the individual worker within the general framework of the agreement.

The compiler of this presentation has observed in this connection:

> "The handling of workers' grievances on the job is perhaps the single most important function of modern unionism. No union can afford to let down on this vital phase of union functioning. It is easy to see why this should be so: grievances are matters which affect individual workers in a more intimate way than anything else in modern industrial life."[41]

The force of this observation is apparent when we examine the kinds of grievances which are arbitrated, and how, in fact, they *do* affect and are of concern, to *indiviaual* workers in an intimate way. Chamberlain has itemized the coverage of cases decided by arbitration in one important company (unnamed) over a three-year period as illustrative of the scope of arbitration decisions.

> "absences, apprentices, assignment of work, back pay, call-in pay, demotions, discipline, dockage of wages, fair day's work, grievance procedure, hiring-in, holidays, discontinuance of jobs, leaves of absence, lunch periods, merit wage increases, plant protection, premium pay, probationary employees, promotions, rates and classifications, representation of employees, safety rules, designation of seven-day operations, shifts, sick leave, supervisors, temporary employees, transfers, union jurisdiction, vacations, and work week."[42]

The same pattern is indicated in a U. S. Bureau of Labor Statistics analysis of the grievances reaching arbitration in the bargaining relationships between the Bethlehem Steel Co and the United Steelworkrs of America, and reiterate the singularly personal character of the grievances.

> "More than three-fourths (788) of the 1,003 cases were related specifically either to wages or job classifications, or problems concerning seniority. Most of the wage grievances were over hourly or incentive rates established for a specified job or requests for adjustments in hourly or

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[41] Barbash, *Labor Unions in Action*, p. 106 (1948).

[42] Chamberlain, *The Union Challenge to Management Control*, p. 108 (1948).

incentive rates. Almost two-thirds of the seniority grievances reaching arbitration resulted from layoff, downgrading, or 'bumping,' and an additional 20 percent concerned promotion problems.

"Next in prevalence were those grievances concerning discipline or work force assignment. Combined, these categories accounted for almost 15 percent of the total number of grievances reaching arbitration. Disagreements over such issues as job assignment, vacation rights, work schedule, or jobs excluded or included in the bargaining unit, were the causes of most of the remaining grievances."[43]

Updegraff and McCoy with extensive arbitration experience describe some of the most frequently recurring types of disputes which reach arbitration.

"Seniority—One of the most prized rights of the employee today is the right to have his seniority considered in cases of lay-off and promotion. . . .

"The dispute may be as to the proper legal construction of the provision as related to a certain state of facts, or it may be the result of a claim that an employee's seniority right was violated when he was passed over for a promotion, or was laid off out of turn. . . .

"Discipline Cases—Perhaps the greatest single cause of disputes is the imposition of discipline—discharge or layoff. The union may contend that the employee was not guilty, or that he was discriminated against in being disciplined when similar offenses by others went unnoticed, or that his punishment was more severe than justified. . . .

"Working Conditions—Job assignments, work-loads, rest periods, safety precautions, and similar working conditions form the subject of many grievances which frequently go to arbitration. . . .

"Overtime Pay—. . . A tremendous number of disputes have arisen over the proper interpretation of these laws [i.e., Walsh-Healey and Fair Labor Standards] and contract provisions."[44]

This characteristically personal nature of the grievances means that the magnitudes of wage loss claimed as the result

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[43] *Arbitration of Labor-Management Grievances, Bethlehem Steel Company* and *United Steelworkers of America, 1942-52*, Bulletin No. 1159, p. 3 (1954).

[44] *Arbitration of Labor Disputes*, pp. 130, 131, 133-4 (1946).

of an alleged misclassification or layoff out of seniority order or suspension on account of an alleged act of misconduct are typically small. However small, they are of importance to the worker but the chances are that he will not normally go to the expense and time of litigation to enforce his rights. The upshot is that the constructive enforcement of these small claims is available only through the union as bargaining agency, which to be sure is concerned with getting the employee his due, but it is also concerned with maintaining the integrity of the agreement.

Aside from the tangible personal benefits which individual workers receive from the grievance arbitration system, many authorities have stressed the security which the employee achieves if he has the assurance that there is available an ultimate adjudication of his grievances by an impartial authority. Killingsworth has put it this way:

> "Under an arbitration clause, the employee who has been disciplined, refused a promotion, paid the wrong rate, or denied some other right under the agreement can (if his union thinks he has a case) get a hearing before a person that both the company and the union regard as impartial. If the employee and his union can prove his case, he gets redress. In Bethlehem, many employees have won back pay, reinstatement, promotion, and other remedies through arbitration. At the same time the supervisory official against whom complaints of unfair treatment are made is also protected by the process. Without arbitration, employees may develop bitterness against the supervisor and the company even if their charges are without merit. If the supervisor is upheld in arbitration, it is hard for anyone to argue that the complaints were really justified despite this outcome. Grievance arbitration extends to the workplace the idea of affording every man his day in court."[45]

Katz makes the point that the availability of arbitration as the final step in the grievance procedure "gives a sense of security to the parties. It reassures the workers and their repre-

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[45] "The Bethlehem Experience," *Annual Proceedings, Industrial Relations Research Association*, p. 133 (1953).

sentatives that the adjustment of the grievance is not entirely in the hands of the employer."[46]

McCabe asserts:

> "Inasmuch as a dispute is in effect an appeal by the worker for the overriding of a decision made by the employer or his agent, the worker loses if the procedure fails to procure action. Inaction or stalemate leaves the worker where he was before he protested or appealed. To be satisfactory to the workers the procedure must insure that, if a settlement is not reached by agreement, a decision will have to be given. Obviously, too, the procedure must provide that the decision shall be made by an outside body or person. Collective bargaining for terms of employment logically requires this. Unless an interpretation or application of the agreement can be appealed beyond the employer who is an interested party to the dispute, the terms agreed upon may be whittled away by *ex parte* interpretation."[47]

4. The Union Has a Vital Interest in Compliance with Contractual Wage Provisions

The obverse side of the "comparmentalization" theory is that the benefits of the contractual wage provisions run exclusively to the employee. This side of the theory is only partly accurate. To be sure it is the employee who receives wages, not the union. But being only partly correct it misses the point: how *much* pay and pay under what conditions.

It is an elementary fact of collective bargaining that the wage terms of an agreement reflect a "legislative history" of the intent of the parties in agreement on certain wage terms and the surrounding economic facts which lie behind the wage terms. So that the failure to comply with the wage terms of the contract or accommodation to new conditions which arise during the term of the contract involve issues which go far beyond whether or not a worker has received his due. In short the union does have a substantial interest in compliance with the wage terms of the agreement.

Standardization within a plant and between plants is a vital goal of collective bargaining, and is invariably part of the "leg-

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[46] *Op. cit., supra,* note 19, at p. 260.

[47] 5 *Law and Contemporary Problems* 266 (1938).

islative history" of the wage terms of the agreement. George W. Taylor has said:

> "Acceptance of collective bargaining by an employer means in these terms that management is willing to 'go along' and cooperate with the union in developing union security and standardized conditions of employment *within a plant and between competing plants.*"[48]

Or, as Ross has put it: "However we entitle them, comparisons play a large and often dominant role as a standard of equity in the determination of wages under collective bargaining."[49]

Ross continues:

> "Comparisons are important to the employer, whose greatest anxiety, in the absence of imperative economic pressures, is to avoid 'getting out of line.' One of the cardinal sins of business conduct is to offer a wage rate, or a wage increase, which proves embarrassing to other employers. In a period of aggressive union demands, there is a tightening of discipline in the business community; 'getting out of line' is regarded as equally irresponsible with grand larceny.
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> "Comparisons are important to the worker. They establish the dividing line between a square deal and a raw deal. He knows that he cannot earn what he would like to have, but he wants what is coming to him. In a highly competitive society, it is an affront to his dignity and a threat to his prestige when he receives less than another worker with whom he can legitimately be compared. At times he is not sure what makes a legitimate comparison, and needs guidance on the point; this is one source of the moral authority enjoyed by the union leader. . . .
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> "Comparisons are crucially important within the union world, where there is always the closest scrutiny of wage agreements in the process of negotiation as well as those already negotiated. They measure whether one union has done as well as others. They show whether the negotiating committee has done a sufficiently skillful job of bargaining. They demonstrate to the union member whether he is getting his money's worth for his dues. A favorable

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[48] *Government Regulation of Industrial Relations*, p. 63 (1948). [Italics added.]

[49] *Wage Determinations Under Collective Bargaining*, reprinted in Shister, *op. cit., supra*, note 31 at 249.

comparison ('the best contract in the industry') becomes an argument for the re-election of officers, a basis for the solidification and extension of membership, and an occasion for advancement within the official hierarchy. An unfavorable comparison ('the best we could do under the circumstances') makes it likely that the rank and file will become disgruntled, rival leaders will become popular, and rival unions will become active.

"Finally, comparisons are important to the labor arbitrator. The 'going rate' and the 'prevailing pattern of adjustment' are probably the most compelling criteria of wage determination. Anyone familiar with the realities of arbitration realizes to what extent the other standard criteria are subordinated to this one and employees as supporting rationalizations." [50]

Millis and Montgomery conclude that "in many instances the standardization of wages on the basis of standards already observed by some of the employers is the primary objective of the union. . . . While an effort to equalize and standardize wages and hours in the market may not be made in the first instance, it is likely to appear sooner or later in a unionized trade. Indeed, in many instances the standardization of wages on the basis of the standards already observed by some of the employers is the primary objective." [51]

The union goals in grievance handling, as stated by the author of this presentation, reflect the crucial importance of standardization.

"No grievance can generate more friction among the workers themselves than the existence of disparate rates for the same kind of work, or derangements in the normal job hierarchy. The union looks upon the job of ironing out wage inequities as among the most important in maintaining the support of its membership, since one of the important reasons workers join unions in the first place is to achieve uniformity of treatment. Golden and Ruttenberg put it this way: 'Wage equalization . . . is one of the most explosive jobs either unions or management together or separately can tackle.' Interplant or intercompany wage disparities, particularly as between organized and unorganized companies, put the union in a position

[50] *Id.* at 249-50.

[51] *Organized Labor*, p. 371 (1945).

where it must act to bring up the wages at the lower end of the range. This holds particularly true where labor costs constitute a relatively high proportion of total costs. In terms of the dynamics of union wage policy, the aim is generally to maintain a sensible relationship among various classes of wages as much as it is aimed at achieving some absolute goal of earnings for union members."[52]

5. Seniority Affects Both the Individual Employee and the Group

The seniority provisions of the contract provide an illuminating illustration of why it is hazardous to allocate benefits of a provision to "either-or" categories.

It is well known that employees value their seniority protection highly. It is their only guarantee against arbitrary action in case of a layoff.

It is obvious, however, that the grievance of an employee with respect to a seniority issue cannot be adjusted without affecting the equities of all other employees in a given seniority unit. As the bargaining agency the union is therefore in the unique position of evaluating the seniority claims of an individual employee in relation to the seniority of all other employees in the unit *before* it files a grievance.

Here, then, is a type of grievance that affects the individual *and* the group. There is no practical way of enforcing the seniority provisions other than through the union as the recognized spokesman for the group.

6. Concluding Remarks on "Compartmentalization Theory"

There is a much more fundamental misconception at the bottom of the compartmentalization theory than the specific questions of whether checkoff provisions or union security provisions benefit individual employees, or whether the union has a valid interest in enforcing compliance with the wage provisions of an agreement. This misconception is that there is a large area of conflict of interest or division of interest as between the union and its members. It was such a misconception that was at the bottom of the Smith-Connally Act, passed in 1943. Under that Act unions were required to give notice

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[52] *Labor Unions in Action*, pp. 75-76 (1948).

30 days in advance of striking at a plant operated by a war contractor. During the 30-day period the NLRB was required to take a secret ballot to determine whether or not the employees "will permit any such interruption of war production." While this Act was in effect 2,168 polls were taken by the government. In 1,850 polls, or 95 percent of the total, the vote was in favor of striking. The uselessness of this provision was so apparent that the appropriations act of the NLRB for 1945 prohibited the expenditure of funds for strike vote purposes in spite of the fact that the law itself was still technically operative.[53]

The essential point here is not, of course, the value of polls in labor management relations. Nor is it, that there are not, abstractly, differences between the interests of the union as a union and the interests of employees. Of course there are and in some areas of labor relations it may be sound public policy to give recognition to these areas as, for example, where workers are discriminated against by a union on account of race, color or creed.

But in the area which the theory has undertaken to draw distinctions—that is whether the benefits of specific provisions run to the union or to the employee—it has entered a realm of higher speculation which may be appropriate for purposes of epistemology but which runs contrary to the well-established usages of the collective bargaining process.

Rather, we use the data above to confirm what is known to every realistic practitioner in the field of labor relations; that it is not sensible to draw any distinction between provisions benefiting the union and provisions benefiting the employee on the theory that there may be conflicts or division of interests.

As a report of the tripartite Labor Committee of the Twentieth Century Fund said:

> "Labor's chief move to counter job insecurity has been to build strong, secure unions. The organized worker looks upon the union as his primary safeguard against the risks of both the competitive system and the favoritism of management. Even a sizable proportion of nonunion

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[53] *Hearings before the Committee on Labor and Public Welfare, United States Senate, 83rd Congress, 2nd Session, on Taft-Hartley Act Revisions*, Part 6, p. 3121 (1954).

workers feel the same way. The individual worker's desire for security thus dovetails neatly with one important requirement of the union as an institution—that is, survival. Workers who have lived sufficiently long under the protection of a trade union will often act counter to their individual self-interest to safeguard the security of their union when convinced it is in jeopardy."[54]

B. Criticism of the Theory That the Union's Interest in Enforcement Lapses (with Respect to the Category of Provisions Which Are Alleged to Be of Primary Benefit to Employees) With the Making of the Agreement

The factual basis to refute this phase of the theory has been laid earlier. At this point we will simply piece together the threads of the analysis.

1. Collective bargaining is a continuous and integrated process which only *begins* with the making of an agreement but necessarily includes administration, application and enforcement of the agreement *(supra*, pp. 56-66).

2. The union as bargaining agency is the chief focal point of interest on the employee's side of the bargaining relationship throughout the *entire* collective bargaining process with respect to *all* of the provisions of the agreement. (We have italicized the key words in this formulation.)

3. It is therefore absurd to argue that with respect to a certain category of contract provisions the union *can* act as the party at interest in enforcement through the grievance machinery and through arbitration, but that it *cannot* act as a valid party at interest with respect to necessary subsequent enforcement of these provisions in the courts. If a judicial opinion reaches a conclusion that bars the union as bargaining agency, from asserting its interest beyond the making of an agreement, then it is not consistent with the process of collective bargaining as commonly practiced by the collective bargaining community.

VI

INDIVIDUAL RIGHTS ARE PROTECTED

It cannot be validly inferred from this whole analysis, aimed, to be sure, at demonstrating "the paramount interest of the

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[54] *Partners in Production*, pp. 39-40 (1949).

bargaining agent" that the individual employee or union member is powerless to assert his rights. On the contrary, union government is characterized by a system of due process through which the individual employee can influence outcomes within the limits of representative government. And if he is denied these rights or discriminated against he has available to him specific remedies in the courts and the National Labor Relations Board.

A. Due Process and Democracy in Union Government

Virtually all unions have established channels through which the individual worker can, and does, as a matter of right not dispensation, make his personal interests felt in the policies of the union.

Shister has made extensive studies of the extent of participation in collective bargaining. Pertinent conclusions follow.

> 1. "The evidence discloses that by and large the American trade union member has adequate *opportunity* to participate in the policy making functions of his union."[55]
> 2. "The record discloses that, by and large, the rank and file is given adequate opportunity to elect the people who, directly or indirectly, participate in the negotiations with the employers."[56]

Whitney confirms the essential democratic character of union government:

> "Some people may argue that under a system of collective bargaining, the individual worker has no greater opportunity for self-determination than in a nonunion industrial environment. It is contended that through unions, workers merely transfer the authority for the determination of working conditions from employers to labor union officials. Such a point of view ignores the political structure of labor unions. True, some unions are more democratic than others, and it is expected that the degree of rank-and-file control of union affairs varies directly with the degree of democracy in the labor organization. However, it should be noted that even in the most

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[55] "Who Controls Union Policies" in *Readings in Labor Economics and Industrial Relations*, p. 218 (1951), italics in original.

[56] *Id* at p. 219.

autocratic union, the rank and file still has the power to sweep union leadership out of office. This possibility for change is not present in the employer-employee relationship. Workers cannot remove representatives of management from office. In short, members of unions are aware that conditions of work are being determined by people of their own class, and that these representatives are fundamentally responsible to the rank and file." *Government and Collective Bargaining*. p. 10 (1951).

With respect to the democracy of the grievance procedure we have observed:

"From the perspective of functioning democracy, the handling of grievances between the union committee and supervision is a demonstration of popular participation at its best. The workers' representatives are highly responsive to their constituents; the workers, being close to the problems, are well informed about the issues and the units for which grievances are handled are small enough so that the element of individual personality is not submerged."[57]

B. Protection of Individual Rights Available Under Law

We have developed an ample body of law to protect the legitimate interests of indiivduals in those instances where union procedures fall short of providing equitable treatment.

Section 8(b)(1) of the Labor Management Relations Act, 1947, prescribes that "it shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed under Section 7:. . . ."

Section 7 of the same Act states:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

It is now well settled law that the right of exclusive repre-

[57] Barbash, *Labor Unions in Action*, p. 112 (1948).

sentation by the bargaining agent does not render it immune from the responsibility to exercise reasonable efforts in behalf of *all* of the workers represented, union members as well as non-union members. It is clear too that the National Labor Relations Board and the courts will provide remedies to deter and restrain violations of the rights of minorities which go beyond the bounds of reasonableness.

In *Hughes Tool* (104 NLRB 318 (1953) the Board asserted:

> "The Board has, accordingly, observed that an organization which is granted exclusive bargaining rights under Section 9 has, in return, assumed the basic responsibility to act as a 'genuine representative of *all* the employees in the bargaining unit.'[16] (Emphasis supplied). To hold otherwise, in view of the language of Section 9, would be to allow the exclusive position of the representative obtained through the authority of the Act to be used in a manner detrimental to the very employee the statute is designed to protect.
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> "The duty of equal representation, however, which is inherent in the exclusive representative status accorded by the statute, is not concerned alone with questions of race, color, or creed. The certified representative's ex-exclusive authority to bargain and represent may be achieved by virtue of the support of a bare majority of the employees in the appropriate unit. Discrimination in the performance of the duties of the representative designed to deny equal treatment to those of the minority is to subvert the privilege and rights granted by the statute. Whether such discrimination is based on union membership or the lack thereof, rather than on considerations of race, creed, or color is, in our opinion, irrelevant.
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> "We believe it is also clear that the presentation and adjustment of grievances is an activity which is subject to this requirement of nondiscriminatory representation by the certified union."

[16] "Larus & Bros. Company, Inc., supra" [62 NLRB 1075 (1945)].

In *Steele* v. *L. and N. R. Co.*, 323 U. S. 192, this Court stated:

> "The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affilia-

tions or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act in *J. I. Case Co.* v. *Labor Board, supra,* 338, 'The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit . . .' The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it."

And later at p. 204:

"So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action."

This principle of responsibility of the bargaining representative was reaffirmed by this court in *Ford Motor Co.* v. *Huffman* (345 U. S. 330, 1953):

"The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents."

With respect to the grievance procedure, the NLRB asserted the legal obligation of the union to represent *all* employees without discrimination. In *Hughes Tool,* cited above, the Board declared "all employees in an appropriate unit are entitled, upon their request, to the impartial assistance of the

certified representative in the filing and adjustment of grievances." (p. 327.)

C. Employees Can Displace Their Existing Bargaining Agency

Under the Labor-Management Relations Act, employees can change their existing bargaining agency if it fails to reflect their interests adequately. This can be done by voting in a new bargaining agency or "decertifying" the existing bargaining agency. (9(c)(1).)

VII

THE QUID PRO QUO IN COLLECTIVE BARGAINING

What is it that the union, as bargaining agency, and the employer, buy from each other when they enter into a collective bargaining relationship which begins with the making of the agreement?

Of course the employer commits himself to abide by the terms of the agreement relating to wages, hours and working conditions. Of course the union invariably commits itself not to strike during the life of the agreement.

But actually the quid pro quo for each side runs deeper than these obvious considerations. If the concept of collective bargaining as a continuing and continuous process during the life of the agreement has any merit, what the union and the employer *actually* buy is a commitment to observe and enforce, for each of their respective sides, the rules of a form of industrial government set in motion by the making of the agreement, for the duration of the agreement.

Under the rules emerging from this system of industrial government, the employer has a right to expect from the union that (1) it will live up to and observe the rules insofar as the union, *qua* union, is concerned and (a) (equally important) that it will see to it that every employee who is part of the bargaining unit will abide by these rules. So that if an employee objects to the settlement of a grievance made by the union in his behalf with the employer, then the employer under the rules of this industrial government can appropriately insist that a final determination of the issue has been made

with the union and that it is up to the union to secure compliance on the part of the individual employee with the terms of the settlement or adjustment.

Similarly, if an individual employee is dissatisfied with an arbitration award of a grievance, the employer in effect gets a commitment that the award is final, that he is under no obligation to negotiate any further with the individual employee.

This concept of what the parties get from each other in the agreement can be firmly buttressed by the analysis which leading students of the collective bargaining processes have made.

On the concept of collective bargaining as industrial government, Slichter has observed:

> "Collective bargaining, as carried on by labor unions with employers, has two principal aspects. In the first place, it is a method of price-making—making the price of labor. In the second place, it is a method of introducing civil rights into industry, that is, of requiring that management be conducted by rule rather than by arbitrary decision. In this latter aspect, collective bargaining becomes a method of building up a system of 'industrial jurisprudence'."[58]

The Twentieth Century Fund, a private tripartite (labor, management and public) organization describes collective bargaining as applying the "principles of representative democracy to industry and [the working out of] a sort of industrial common law for the conduct of union-management relations."[59]

The role of the union as enforcer of the rules jointly determined by the union and employer has been aptly stated by Summers: The union in bargaining, Summers says, "negotiates a contract which becomes the basic law of [the] industrial community. In making those laws the union acts as the workers' economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the workers' policeman and judge. The union is, in short, the employees' economic government."[60]

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[58] Union Policies and Industrial Management (1941) p. 1.

[59] Trends in Collective Bargaining, p. 3 (1945).

[60] "Union Powers and Workers' Rights" in University of Michigan Law School, *The Law and Labor-Management Relations*, p. 375-6 (1951).

Thus even where a collective bargaining agreement merely incorporates past practice which existed prior to the agreement it actually represents an exchange of benefits. The difference for the employer is that under a unilateral system he cannot appropriately expect the kind of "self disciplining labor force" which the Twentieth Century Fund Committee characterized as a "cruicial" management stake in collective bargaining.[61] The employees similarly cannot call on an established agreement and grievance machinery to enforce their claim. They can only rely on the good conscience of the employer. And both public policy and employee sentiment have not found good conscience fully adequate to protect their respective interests.

The recent experience of the Studebaker Corporation and the United Automobile Workers of America, CIO, provides a dramatic illustration of the mutual benefits which are derived from this system of industrial government. When faced with the necessity of cutting wages the collective bargaining relationship provided a mechanism by which the consent of a majority of those to be governed could be obtained. More importantly, the existence of that relationship and the collective bargaining agreement established that, once the majority had agreed, the change would be regarded by all, including the dissenters, as the accepted rule for the industrial community during the period of the agreement.

In short—while the collective agreement establishes wage rates and other benefits these are not in the final analysis the essence of what the parties get from each other. What the parties do gain from collective bargaining are the benefits of a system of industrial government to administer the employer-employee relation.

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* Signifies experience as arbitrator in labor-management disputes as indicated in sources cited above.

APPENDIX B

THE CONTENT OF WRITTEN AGREEMENTS

(From National Labor Relations Board, Division of Economic Research, Bulletin No. 4, *Written Trade Agreements in Collective Bargaining* 39-41 (1939).

The written trade agreement has experienced an evolution similar to that of other business documents. As we have seen, it developed originally from a simple memorandum or bill of prices, and by the end of the nineteenth century the comprehensive trade agreement was in use. Today the agreement is typically a detailed, technical document covering all major conditions of employment.[40] Its content may be divided roughly into four sections.[41] First there is a preamble which sets forth the principles of the agreement, sometimes with a pledge and mutual good will and confidence. This section also describes the processes of collective bargaining and indicates the status of the union, i.e., explicitly grants union recognition. A second section of the agreement enumerates specific conditions of employment. Wages and hours are given in detail together with other provisions. A third section of the agreement provides for its administration and interpretation. Finally, there is provision for duration and renewal.

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[40] A very recent discussion of trade agreement provisions is found in *The Collective Labor Agreement* by Elias Lieberman, 1939.

[41] Professor Hoxie, writing in 1923, used the following classification: "(1) A preamble, defining the parties to the agreement, its scope or field, its duration, and its general purposes. (2) A legislative code, giving the working rules, etc. The points covered by the legislative part of the agreement range from wages and hours to the most minute regulation of all the technical conditions or incidents of work and pay. (3) A judicial code defining the mode of interpretation. (4) An executive part, providing a mode for enforcement. Not all trade agreements have all these distinct and essential parts. They range from the rudimentary ones, including the preamble and legislative code, to those which are most formal and elaborate, containing all parts." Cf. Hoxie, *op. cit.*, pp. 264–65.

The preamble[42] is really a definition of terms and policy. Following the recognition clause are provisions which define the type of workers to be covered by the agreement, distinguish between worker and supervisory force, outline rules for the admittance of union representatives to the shop or company property for conferences with individual workers and management or for other purposes. A very important provision is that governing employment policy as it relates to hiring, layoff, recall, transfer, and promotion.[43] Such policy is usually expressed in terms of a seniority principle, which may be very simply defined in the agreement or elaborately detailed.[44]

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[42] The preamble of a clothing agreement is summarized by Gordon S. Watkins: "In the preamble is set forth what both the union and the employer desire and expect from this written instrument of mutual understanding. The employer desires the establishment and maintenance of discipline and efficiency and anticipates that by the exercise of this discipline all stoppages and interruptions will cease. He expects, moreover, that adherence to the agreement will issue in good standards of workmanship and conduct, that proper quality, quantity, and cost of production will be assured, and that cooperation and good will will obtain between management and men. The union desires that the agreement will operate in such a way as to maintain and strengthen its organization, making possible complete cooperation with the employer and the protection of the workers' interests. It expects, moreover, that there shall be quick recourse to established tribunals in cases of grievances and disputes, such tribunals to be created jointly by the employer and itself." In *Labor Problems,* 1935, pp. 491-92.

[43] Insofar as this provision affects the union's status, it is particularly important during the early stages of collective bargaining when the union is still confronted with the problem of establishing secure organization.

[44] "Seniority, as used in industrial relations, is preference in certain conditions of employment, on the basis of an employee's length of service. The right of seniority is based on the principle that the greatest possible job security, opportunity for promotion, and other privileges should go hand in hand with satisfactory performance on the job." For a detailed discussion of seniority provisions in collective agreements cf. U. S. Bureau of Statistics, *Monthly Labor Review* December 1938, p. 1250.

The wage and hour provisions are of central importance.[45] Minimum rates for specified groups are basic, and sometimes differentials are provided to take account of occupational differences. The manner of payment (by hour, day, or week), the payment period (weekly, semimonthly, or monthly) and the form of payment (cash, check, or otherwise) are specified in the agreement. Miscellaneous wage provisions include bonus plans, traveling expense items, and penalty rates. Provision for hours of work may be simple or complex.[46] There may be nothing more than the total number of hours per day and per week, or there may be detailed provisions, e. g., the beginning and end of the workday, the timing of shifts, the meal period, and rest periods. Limitations upon overtime occur almost universally, together with penalty rates for overtime permitted under the agreement.[47] Holidays and paid vacations are additional features of the agreement.[48]

Agreements are frequently concerned with the comfort and safety of workers, involving washrooms, toilets, lockers, lunchrooms, ventilation, heating, lighting, the guarding of machinery, etc. Apprenticeship programs are governed either by the terms of a comprehensive agreement or a special agreement drafted for the purpose. the provisions cover the period of apprenticeship, the content of

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[45] Professor Yoder writes (*op. cit.*, p. 446): "A very large portion of many trade agreements is given over to the detailed statement of wage scales. Page after page of the printed agreements contain paragraph after paragraph describing various classifications of workers and rates of payment for each class. It is natural, therefore, that the trade agreement is in common labor parlance, a wage agreement."

[46] For illustration of time provisions cf. "Hours of Work Provided in Collective Agreements in 1937," U. S. Bureau of Labor Statistics, *Monthly Labor Review*, February 1938.

[47] *Ibid.*, p. 345.

[48] Cf. "Vacations with Pay under Union Agreements," U. S. Bureau of Labor Statistics, *Monthly Labor Review*, June 1937.

the training program (sometimes in great detail), the number of apprentices that may be employed, and the schedule of wage rates to be applied during the training period. Other provisions of a miscellaneous character are found in the agreement.[49]

The sections of the agreement which relate to its administration and interpretation are especially important because they provide a basis for continuous collective bargaining. It is impossible to provide for all contingencies in drafting an agreement, and even if it were possible, the effects of so rigid a construction might be undesirable.[50] Accordingly the agreement provides for administrative and interpretative machinery. Procedures may be outlined in very general terms in the agreement, or they may be carefully detailed, step by step. Where collective bargaining is very well established, there is often

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[49] A selected list of references taken from issues of the U. S. Bureau of Labor Statistics *Monthly Labor Review* illustrates miscellaneous provisions of the written agreement.

1929: "Safety Codes should be Written into Agreements and Contracts," June.

1930: "Checkoff Provisions in Collective Agreements," January; "Holiday Observance, Provisions for, by Industry," August; "Contracting by Union Members, Provisions Against, by Industry," September.

1931: "Out of Town Work, Compensation for, Provisions for, by Trade," August; "Employers or Contractors Doing Journeymen Work, Agreement, Provisions, by Industry," September; "Union Members, Discharge of, Agreement Provisions," September; "Union Members, Employment of; Agreement Provisions," October.

1934: "Health of Union Members, Analysis of Provisions for Protection of, by Trades," March.

[50] "• • • Obviously, if the wage schedules and other clauses of the collective agreement were inclusive enough to cover all questions that will arise, and so clear as to exclude conflicting interpretations, there would be no inherent need for a machinery for handling disputes. But this is difficult, if not impossible, to attain, even if it were desirable to make a collective agreement of so rigid a pattern." David A. McCabe, "Machinery for the Adjustment of Disputes," in *Law and Contemporary Problems*, Spring 1938, pp. 261-62.

a permanently constituted adjustment body whose jurisdiction and responsibility are defined in the agreement.[51]

The renewal and revision clauses of the agreement are equally important as a basis for continuous bargaining. The provisions of the agreement are usually in effect for a specified period of time, as a rule from 1 to 5 years, and strikes or lockouts are prohibited during that period. Very often, as a result of an automatic renewal clause, agreements are in effect continuously. They may be reopened from time to time for modification or they may be terminated if either party files a required written notice.

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[51] E. g., arbitration machinery in clothing and printing industries, and the special adjustment machinery in the railroad industry.

APPENDIX C

Bulletin No. 908–16 of the
United States Bureau of Labor Statistics

Collective Bargaining Provisions

Grievance and Arbitration Provisions

Introduction

In the day-to-day operations of a plant, involving hundreds and sometimes thousands of workers, problems are bound to arise which affect labor-management relations and the application or interpretation of the terms of the union agreement. They may deal with the procedure of making time studies, the assignment of jobs, disciplinary action, the fairness of transfers and promotions, and other matters involving individual workers or groups and whole departments. Sometimes situations develop which were not foreseen when the agreement was negotiated and for which the agreement has made no provision; occasionally the terms themselves are ambiguous. There are, in fact, few matters contained in labor agreements, and few aspects of the employer-employee relationship which may not, at one time or another, provide the basis for a controversy.

Because of the wide range of potential misunderstandings, practically all collective bargaining agreements set up some sort of grievance adjustment machinery to insure smooth and uninterrupted operations of the plant under the agreement. The grievance machinery exists to interpret and apply the agreement clauses and give realistic and practical significance to many of its provisions. It is the medium through which employees may protest any alleged or real injustices caused by management in exercising its functions.

The grievance machinery has variable functions, depending on the scope and limitations on its use prescribed in the agreement. Its function may be restricted to fact finding in those instances where the dispute centers about the presence or absence of certain facts. Was the discharge for a justified cause? Is an employee qualified to fill a certain position? Was the job done in a workmanlike manner?

It may have a judicial or interpretive function particularly when the dispute arises from the agreement itself and involves the interpretation, application, or enforcement of the agreement terms. Does

the seniority clause provide for plant-wide, or departmental seniority? When overtime is permitted "in an emergency," do rush orders constitute emergencies? The line between fact finding and interpretation is not always clear and, even where clear, both aspects may be involved in a dispute.

Insofar as the grievance procedure results in the creation of rules and regulations to cover a situation not foreseen by the parties at the time the agreement was negotiated, its function is also legislative or law-creating. There is a legislative implication in the joint preparation of rules and regulations which are provided for in some agreements, to implement and make workable certain provisions accepted in principle by both parties, but not sufficiently amplified for application.

Grievance procedures are essentially devices for maintaining peace and orderly operations in the plant. They constitute explicit recognition by labor and management of the need for replacing unrest and dissatisfaction, which may arise during the life of the contract, with an agreed-upon framework for handling and disposing of problems arising in the day-to-day relationships between the management and workers.

As experience in most plants has proven, the most important element in the successful adjustment of plant problems is a wholesome attitude of the parties to the agreement and to each other—good faith and confidence in each other, a cooperative spirit, and mutual respect. Nevertheless, the procedure itself is an important factor in the maintenance of harmonious relations and a safeguard against possible work disruptions. A good procedure promotes the development of good relations even though it does not in itself insure successful adjustment. A poor procedure is a stumbling block in the way of good relations, since it focuses disagreement over the procedure itself rather than over the problem.

The method of using the procedure is that of presenting an issue to successively higher levels of management until it is adjusted, is referred to arbitration, or settled by some other means. It is understood, or explicitly stated, that strikes and lock-outs are to be used only after all other steps provided for the adjustment of the dispute have failed.

Except for a few industries or trades which have developed their own unique practices, there exists a basic pattern underlying the procedure for adjusting disputes in most plants.

The first stage in the adjustment process is the crystallization of a specific grievance and its presentation to a representative of the employer. There are several alternative methods by which the complaint may be presented—by the aggrieved worker himself, by a union

representative working in the plant who has this specific assignment, or by a union representative not employed in the plant, as for example, the union business agent. The first-stage representative of the company in almost every case is the foreman.

The second stage, if the complaint has not been satisfactorily adjusted in the first instance, consists of one or more negotiations on the part of union representatives with successively higher levels of management. In those agreements made between a union and an association of employers, rather than an individual company, the hierarchy of appeals usually includes negotiations with officers of the association.

A succeeding stage is mediation. Some agreements provide that on the failure of the parties to reach a settlement by direct negotiations, an outside agency, such as the Federal Mediation and Conciliation Service, shall be requested to mediate the dispute.

The last stage is arbitration by an impartial arbitrator or arbitrators (or a bipartisan board with an impartial chairman).[1]

Depending upon the character of the industry, as well as the bargaining tradition of the union, appeal of a foreman's decision on a grievance to the higher company officials may be handled by the officers of the local union with or without the active participation of regional or international union officers in the final stages of negotiations. Locals organized on a city-wide basis, or including many small shops or work places in a given area, ordinarily settle their grievances without reference to their international officers, the business agents dealing with the designated officials of the companies.

On the other hand, unions bargaining with large industrial corporations often delegate the higher stages of grievance appeals to their regional or international representatives in order to take advantage of the more skillful bargaining ability of the higher union officials. Also, when a grievance case reaches the highest company officials, the decision may involve an important principle of union-management relations, applicable to more locals than the one originally involved in the dispute.

The employee's immediate supervisor is ordinarily the first representative of management to whom a grievance is presented. In small establishments, the owner himself may handle the initial complaint; in large individual concerns the foreman, the department superintendent, division superintendent, and the plant manager may take their turn in dealing with the union. Personal or labor relations officers, where these are employed, usually take an active part when appeal is taken beyond the foreman, although in some instances the personnel

[1] See p. 81, Arbitration.

officer is involved only after negotiations with the departmental officials have failed to secure a settlement.

In a number of industries, agreements are made with associations of employers which are city-wide, regional, or Nation-wide in scope. Although these associations at times serve solely for the purpose of negotiating new agreements, they may also act as enforcement agencies, in which case the association officials help to settle disputes which arise between the union and any employer who is a member of the association.

Establishment of any grievance procedure entails agreement on the following basic points:

1. *Definition of grievance.*—Some contracts open the machinery to any dispute, while others limit it to interpretations and applications of the agreement.

2. *Representation on grievances.*—This includes the step in the procedure at which the employee may call on the union to represent him, the manner of initiating a grievance, the method of selecting representatives, the functions of such representatives, limitations on the number of union representatives who are permitted to handle grievances, limitations on their activity, special protection and privileges for representatives, and compensation for grievance work.

3. *Appeals procedure.*—This includes the establishment of the procedures to be followed in case the grievance is not disposed of at the first instance; identification of the union and management representatives involved in each step; and the setting of time limits at the various steps, including a limitation of the retroactive date beyond which grievance adjustments shall be inapplicable.

4. *Arbitration.*—Included are definitions of the scope of arbitration, which is sometimes narrower than the area covered by the rest of the grievance machinery; the method of invoking arbitration; the selection of the arbitrator; reference to a permanent arbitrator if the parties agree to have one; the rules of arbitration procedure; and the expenses of arbitration.

APPENDIX D

TABLE OF SUITS BROUGHT UNDER SECTION 301(a)

This appendix lists the reported cases we have been able to find in which suit was brought for breach of contract under the provisions of Section 301(a). It does not include suits in which there was no contract alleged but jurisdiction was mistakenly claimed under Section 301(a). Nor does it include suits begun in state courts and removed to the federal courts under the provisions of Section 301(a).

Suits by Employers Against Unions

Alcoa, S. S. Co. v. *McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948) aff'd 173 F. 2d 567 (1949) cert. denied 338 U.S. 821.

Bethlehem Steel Co. v. *Industrial Union*, 115 F. Supp. 231 (E.D. N.Y. 1953).

Boeing Airplane Co. v. *Aeronautical Industrial Dist.*, 91 F. Supp. 596 (W.D. Wash. 1950) aff'd 188 F. 2d 356 (C.A. 1951) cert. denied 342 U.S. 821.

Boston & Maine Transp. Co. v. *Amalgamated Assn.*, 106 F. Supp. 334 (D. Mass. 1952).

Castle & Cook Terminals v. *Local 137*, 110 F. Supp. 247 (D. Hawaii 1953).

Colonial Hardwood Flooring Co. v. *International Union*, 76 F. Supp. 493 (D. Md. 1948); aff'd sub nom *International Union* v. *Colonial Hardwood Flooring*, 168 F. 2d 33 (C.A. 4, 1948).

Hamilton Foundry and Machine Co. v. *International Molders and Foundry Workers Union*, 95 F. Supp. 35 (S.D. Ohio 1951) aff'd 193 F. 2d 209 (C.A. 6, 1951) cert. denied 346 U.S. 966.

International Plainfield Motor Co. v. *UAW*, 34 LRR Man. 2718 (D. N.J. 1954).

International Union of Operating Engineers v. *Dahlem Const. Co.*, 193 F. 2d 470 (C.A. 6, 1951).

Isbrandtsen Co., Inc. v. *Local 1291 of International Longshoremen's Association,* 107 F. Supp. 72 (E. D. Pa. 1952), aff'd 204 F. 2nd 495 (C.A. 3, 1951).

Isbrandtsen Co., Inc., v. *National Marine Engineers' Ben. Assn.,* 9 F.R.D. 541 (S.D. N.Y. 1949).

Ketcher v. *Sheet Metal Workers International Assn.,* 115 F. Supp. 802 (E. D. Ark. 1953).

Lewittes & Sons v. *United Furniture Workers,* 95 F. Supp. 851 (S.D. N.Y. 1951).

Ludlow Mfg. & Sales Co. v. *Textile Workers Union,* 108 F. Supp. 45 (D. Del. 1952).

Markel Electric Products, Inc., v. *United Electrical Radio and Machine Workers of America,* 202 F. 2d 435 (C.A. 2, 1952).

Morrison v. *Shopmen's Local Union 682,* 114 F. Supp. 54 (W. D. Ky. 1953).

Paterson Parchment Paper Co. v. *International Brotherhood of Papermakers,* 83 F. Supp. 928 (E. D. Penn. 1949), aff'd 191 F. 2d 252 (C.A. 3, 1951), cert. denied 342 U.S. 933.

Pepper & Potter, Inc. v. *Local 977,* 103 F. Supp. 684 S.D. N.Y. 1952).

Potlatch Forests, Inc. v. *International Woodworkers,* 108 F. Supp. 906 (D. Idaho 1951) aff'd 200 F. 2d 700 (1953).

Shirley Herman Co., Inc. v. *International Hod Carriers Building Union,* 182 F. 2d 806 (C.A. 2, 1950).

Stenzel & Co. v. *Department Store Union,* 28 LRR Man. 2607 (W. D. Missouri 1951).

Tenney Engineering, Inc. v. *United Electrical Radio and Machine Workers of America,* 207 F. 2d 450 (C.A. 3, 1953).

United Electrical Radio and Machine Workers of America v. *Oliver Corp.,* 205 F. 2d 376 (C.A. 8, 1953).

Waiaula Agr. Co. v. *United Sugar Workers,* 114 F. Supp. 243 (D. Hawaii 1953).

Wilson & Co. v. *United Packinghouse Workers*, 83 F. Supp. 162 (S.D. N.Y. 1949).

Suits by Unions Against Employers

A. Breach Alleged Affecting Employees Directly:

American Federation of Labor v. *Western Union Tel. Co.*, 179 F. 2d 535 (C.A. 6, 1950) (pension).

Bakery and Confectionery Workers' International Union v. *National Biscuit Co.*, 78 F. Supp. 517 (E. D. Pa. 1948) aff'd 177 F. 2d 684 (compulory retirement).

Bakery and Confectionery Workers v. *General Baking Co.*, 97 F. Supp. 73 (S.D. N.Y. 1951) (lockout).

Food and Service Trades Council v. *Retail Associates*, 115 F. Supp. 221 (N. D. Ohio 1953) (commissions).

Insurance Agents v. *Prudential Ins. Co.*, 34 LRR Man. 2679 (E.D. Pa. 1954) (arbitration of discharge).

International Union of Operating Engineers v. *Pfeiffer Brewing Co.*, 115 F. Supp. 650 (E.D. Mich. 1953) (discharge; wages).

Lexington Federation of Tel. Wkrs. v. *Kentucky Tel. Corp.*, 94 F. Supp. 894 (E. D. Ky. 1951) aff'd 202 F. 2d 153 (1953) (wages).

Local 207 v. *Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954) (discharge).

Local 379 v. *Jacobs Mfg. Co.*, 120 F. Supp. 228 (D. Conn. 1953) (arbitration of discharge).

Local 793, UAW-CIO v. *Auto Specialties Co.*, 15 F.R.D 201 (W. D. Mich. 1951). (holiday pay).

Local 937 v. *Royal Typewriter Co.*, 88 F. Supp. 669 (D. Conn. 1949) (wages).

Local Union No. 600 v. *Ford Motor Co.*, 113 F. Supp. 834 (E. D. Mich. 1953) (removal of work from plant).

Mercury Oil Refining Co. v. *Oil Workers Int. Union, CIO*, 187 F. 2d 980 (C.A. 10, 1951) reversing in part

Oil Workers International Union v. *Mercury Oil Refining Co.*, 89 F. Supp. 702 (W. D. Okla. 1950) (discharge).

Metal Polishers v. *Rubin*, 85 F. Supp. 363 (E. D. Penna. 1949) (lockout).

Milk and Ice Cream Drivers and Dairy Employees v. *Gillespie Milk Products*, 203 F. 2d 650 (C.A. 6, 1953) (reinstatement).

Silverton v. *Rich*, 119 F. Supp. 434 (S. D. Cal. 1954) (minimum wages; union dues).

Slade v. *Sun Shipbuilding Co.*, 23 LRR Man. 2054 (E. D. Pa. 1948) (reinstatement).

Studio Carpenters Local Union v. *Loew's, Inc.*, 182 F. 2d 168 (9 Cir. 1950) cert. denied 340 U.S. 828 (lockout).

Textile Workers Union v. *Aleo Mfg. Co.*, 94 F. Supp. 626 (N.D. N.C. 1950) (discharge).

Textile Workers Union v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953) (separation pay).

Textile Workers Union of America v. *Arista Mills*, 193 F. 2d 529 (C.A. 4, 1951) (reinstatement).

Textile Workers Union v. *Berryton Mills*, 28 LRR Man. 2541 (N.D. Ga. 1951) (reinstatement).

United Automobile Workers v. *Wilson Athletic G. Mfg. Co.*, 119 F. Supp. 948 (N.D. Ill. 1950) (vacations).

United Protective Workers of America v. *Ford Motor Co.*, 194 F. 2d 997 (C.A. 7, 1952) (compulsory retirement).

United Shoe Workers v. *LeDanne Footwear*, 83 F. Supp. 714 (D. Mass. 1949) (wages).

B. Breach Alleged to Affect Only Union Directly:

Duris v. *Phelps Dodge Copper Products Corp.*, 87 F. Supp. 229 (D. N.J. 1949) (recognition; union dues).

Durkin v. *John Hancock Mutual Life Ins. Co.*, 11 F.R.D. 147 (S.D. N.Y. 1950) injunction denied, 92 F. Supp. 893 (1950) (check-off).

Fur Dressers Union v. *Fur Dressers Guild*, 87 F. Supp. 400 (S.D. N.Y. 1949) (sick benefit fund).

International Union of Electrical, Radio and Machine Workers v. *United Electrical, Radio and Machine Workers*, 192 F. 2d 847 (C.A. 6, 1951).

International Union of Operating Engineers v. *Baker Co.*, 100 F. Supp. 773 (E.D. Pa. 1951) (welfare plan).

International Woodworkers v. *McCloud River Lbr. Co.*, 119 F. Supp. 475 (N.D. Calif. 1953) (insurance fund).

Upholsterer's Inter. Union v. Leathercraft Furn. Co., 82 F. Supp. 570 (E.D. Pa. 1949) (social security fund).

C. Breach involving agreement as a whole:

Mountain States Div. No. 17 v. *Mountain States T. & T. Co.*, 81 F. Supp. 397 (D. Colo. 1948).

United Steelworkers v. *Shakespeare Co.*, 84 F. Supp. 267 (W. D. Mich. S.D. 1949).

United Packinghouse Workers v. Wilson & Co., 80 F. Supp. 563 (N.D. Ill. 1948).
tions; seniority; union dues).

D. Breach not specified:

International Longshoremen's Union v. *Libby, McNeill & Libby*, 114 F. Supp. 249 (D. Hawaii 1953), rehearing denied, 115 F. Supp. 123.

Reed v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949) (see also 25 LRR Man. 2397).

Suits by Union Against Union

Durkin v. *Rieve*, 10 F.R.D. 71 (E.P. Pa. 1949).

Suits by Individuals

Schatte, et al. v. *International Alliance, etc.*, 84 F. Supp. 669 (S.D. Calif. 1949) aff'd 182 F. 2d 158 (C.A. 9, 1950) cert. denied 340 U.S. 828.

MacKay v. *Loew's, Inc.*, 182 F. 2d 170, 18 A.L.R. 2d 348 (9 Cir. 1950) cert. denied 340 U.S. 828.